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Cover Page Footnote

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NOTES

IT'S THE PROSECUTION'S STORY, BUT THEY'RE NOT STICKING TO IT: APPLYING HARMLESS ERROR AND JUDICIAL ESTOPPEL TO EXCULPATORY POST-CONVICTION DNA TESTING CASES

*Hilary S. Ritter**

INTRODUCTION

Roy Criner was convicted in 1990 for the 1986 sexual assault and murder of a sixteen-year-old girl in Montgomery, Texas.[1] His conviction rested largely on the basis of incriminating statements Criner made to friends and coworkers on the night the crime occurred.[2] The State also used the results of serology testing performed on the semen collected from the victim's vaginal and rectal specimens,[3] which indicated that the source of the semen was a man with type O blood, to link Criner, who has type O blood, to the crime.[4] Other physical evidence from the crime scene included a cigarette found near the victim's body, a clump of blonde hair found clutched in the victim's right hand, and the victim's clothing.[5]

Post-conviction DNA testing performed in 1997 demonstrated that Criner was not the source of the semen collected from the victim's vaginal and rectal specimens.[6] Regardless, the Texas Court of Criminal Appeals[7]

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1. *See* The Innocence Project, Case Profiles: Roy Criner, http://innocenceproject.org/case/display_profile.php?id=77 (last visited Sept. 28, 2005) [hereinafter Case Profiles] ; *see also Frontline: The Case for Innocence: Four Cases*, http://www.pbs.org/wgbh/pages/frontline/shows/case/cases/ (last visited Oct. 28, 2005) [hereinafter *Four Cases*].

2. Criner bragged to friends that he picked up and had sex with a young woman and "had to get rough with her." Case Profiles, *supra* note 1.

3. *Id.*

4. *See id.*; *Frontline: The Case for Innocence: Interviews: Judge Sharon Keller* (PBS television broadcast Oct. 31, 2000) (transcript available at http://www.pbs.org/wgbh/pages/frontline/shows/case/interviews/keller.html) [hereinafter *Keller Interview*].

5. Case Profiles, *supra* note 1.

6. *Id.*; *Four Cases*, *supra* note 1.

7. The Texas Court of Criminal Appeals is the highest state court for appeals of criminal cases. Texas Online, Government: Courts and Judiciary System,

denied Criner's motion for a new trial on the basis of the exculpatory DNA test results.[8] In denying Criner's motion, the court accepted the State's two new theories of the crime, theories which were never presented to the jury at trial.[9] First, the State contended that the DNA test results were insufficient evidence of Criner's innocence, because Criner could have been wearing a condom during the assault or have failed to ejaculate, two scenarios that had never been presented to the jury at Criner's trial.[10] In the alternative, the State argued that the presence of semen that was not Criner's could have been due to the victim engaging in consensual sex prior to her murder, which the State argued was likely since the victim was known to have been "promiscuous."[11] This theory was also contrary to the theory that the State presented at Criner's trial, where the State contended that the sixteen-year-old victim had not had sex with anyone else, and that it was Criner's semen that was found in the victim.[12]

Criner then obtained post-conviction DNA testing on the cigarette found next to the victim's body.[13] The DNA recovered from the cells on the cigarette filter contained a mixture of DNA from at least three individuals, at least one of which was a male and at least one of which was a female.[14] The female portion of the DNA found on the cigarette was genetically compatible with the DNA profile of the victim, and Criner was eliminated as a source of any of the DNA on the cigarette filter.[15] Moreover, the male DNA found on the cigarette matched the DNA profile of the semen found on the victim's rectal swab.[16] Thus, the male who smoked the cigarette was also the male whose semen was found in the victim—and this person was not Roy Criner.[17] The results of this round of DNA testing also disproved the alternate theories of the evidence advanced by the State to explain how Criner was guilty despite the exculpatory results of the first round of DNA testing.[18] On the basis of this evidence, the State pardoned Criner in 2000, three years after the first round of DNA tests excluded him as the source of

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http://www.state.tx.us/category.jsp?language=eng&categoryId=6.3 (last visited Oct. 5, 2005).

8. *See Four Cases*, *supra* note 1.

9. *See Frontline: The Case for Innocence: Interviews: Judge Charles Baird* (PBS television broadcast Oct. 31, 2000) (transcript available at http://www.pbs.org/wgbh/pages/frontline/shows/case/interviews/baird.html) [hereinafter *Baird Interview*].

10. *Id.*; *see also* Case Profiles, *supra* note 1.

11. *See Keller Interview*, *supra* note 4.

12. *Baird Interview*, *supra* note 9.

13. Case Profiles, *supra* note 1.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Four Cases*, *supra* note 1.

18. *See id.*

the semen found in the victim's body.[19] By the time he was released, Criner had served ten years of a ninety-nine year sentence.[20]

Unfortunately, Roy Criner's plight is not unique. While nearly half of the 163[21] convicted offenders nationwide who have been exonerated through DNA testing obtained access to DNA evidence with the consent of prosecutors, the other half had to engage in protracted litigation to obtain access to, and to prove the probative value of, the exculpatory evidence that eventually set them free.[22] Thus, although post-conviction DNA testing statutes[23] provide a mechanism whereby convicted offenders can obtain DNA testing in support of their post-conviction claims of innocence, the efficiency, ease, and likelihood of success in obtaining relief through the requested testing is often directly dependent on how prosecutors respond to such requests.[24]

This Note examines the two ways in which courts can prevent prosecutors from creating a new theory of the crime when the results of post-conviction DNA testing undermine the theory upon which a defendant was convicted: (1) the adoption of the harmless error test as the standard of review for these cases, and (2) the application of judicial estoppel against the State.[25] Part I describes the forensic application of DNA testing and the three ways in which the results of DNA testing are used in the criminal justice system. Part I also introduces the newly discovered evidence test, which is the standard courts currently use to evaluate claims of innocence based on the results of post-conviction DNA testing, and the harmless error test, which is the standard courts traditionally use to evaluate the impact of

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19. *See* Case Profiles, *supra* note 1; *Four cases*, *supra* note 1.

20. *Four Cases*, *supra* note 1; *see also* Case Profiles, *supra* note 1.

21. This is the number exonerated as of October 11, 2005. *See* The Innocence Project, http://innocenceproject.org (last visited Oct. 11, 2005).

22. *See* The Innocence Project, Causes & Remedies: DNA, http://innocenceproject.org/causes/dna.php (last visited Sept. 28, 2005).

23. To date, thirty-one states have enacted statutes that provide for post-conviction DNA testing, and additional states have made post-conviction testing available through other procedures. U.S. Dep't of Justice, Advancing Justice Through DNA Technology: Using DNA to Protect the Innocent (2003), *available at* http://www.usdoj.gov/ag/dnapolicybook_protect_innocent.htm [hereinafter Advancing Justice].

24. *See* Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 Cal. W. L. Rev. 389, 393 (2002).

25. In addition, prosecutors sometimes oppose—often vigorously—requests for post-conviction DNA testing, arguments which are beyond the scope of this Note. For a review of the ethical and constitutional implications of such arguments, see *id.* *See also* Seth F. Kreimer & David Rudovsky, *Double Helix, Double Bind: Factual Innocence and Postconviction DNA Testing*, 151 U. Pa. L. Rev. 547 (2002); Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 Vand. L. Rev. 45, 61 (1991) (stating that "[i]f the evidence is in conflict, an ethical prosecutor cannot rationalize a conviction simply on the ground that the trial [was] fair"). Furthermore, it is questionable whether the ethical obligations of prosecutors are adequate to protect defendants from the harms of prosecutorial inconsistency. For an argument that they are not, see Anne Bowen Poulin, *Prosecutorial Inconsistency, Estoppel, and Due Process: Making the Prosecution Get Its Story Straight*, 89 Cal. L. Rev. 1423, 1431-33 (2001).

technical errors that occurred at trial. This part also presents the doctrine of judicial estoppel and the application of the doctrine in both the civil and criminal contexts. Part II of this Note examines two ways in which defense attorneys have recently tried to prevent prosecutors from asserting a position contrary to that which they advanced at trial in reaction to post-conviction DNA test results which demonstrate the convicted offender is not the source of critical biological evidence that the State linked to the offender at trial. First, the doctrine under which post-conviction claims of innocence are traditionally analyzed, the newly discovered evidence test, is examined and compared with a proposed test, the harmless error test. Part II next summarizes the different approaches that courts have taken, or have declined to take, in applying judicial estoppel against the State in criminal cases. Finally, Part III of this Note argues that courts should adopt the harmless error test in analyzing post-conviction claims of innocence based on exculpatory DNA test results. In addition, courts should invoke judicial estoppel against the State to bar prosecutors from making arguments in post-conviction proceedings that are inconsistent with the theory of the crime asserted at trial when convicted offenders offer exculpatory DNA test results as evidence of actual innocence.

I. DNA TESTING AND THE CRIMINAL JUSTICE SYSTEM

This part will examine three ways in which DNA test results are routinely used in the criminal justice system: to convict the guilty, to exclude suspects, and to identify those who have been wrongly convicted. This part also will introduce the two standards courts use in reviewing challenges to convictions: the newly discovered evidence test and the harmless error test. Finally, this part will examine the doctrine of judicial estoppel and its application in both civil and criminal cases.

A. *The Use of DNA Testing in the Criminal Justice System*

Today, DNA[26] testing is the foremost forensic technique for identifying perpetrators and eliminating suspects when biological tissues such as saliva,

26. DNA is the abbreviation for deoxyribonucleic acid. DNA stores the genetic code of the human body and determines an individual's personal characteristics, such as eye color, hair color, and height. DNA is found in all human cells, including those found in saliva, skin tissue, blood, the root and shaft of hair, bone, and semen. A person's DNA profile is the same throughout the body, and does not change over the course of a person's life. While the majority of DNA is identical in all humans, for each individual (except identical twins), the sequence of the DNA "building blocks" is different in particular regions of the cell; this makes each person's DNA unique. Moreover, if properly preserved, DNA from bones or body fluid stains can be tested after many years in older cases in which questions of identity remain unresolved or disputed. Thus, in many criminal cases, the DNA from any biological evidence can be analyzed to reliably link criminals to crimes or clear people as suspects. Nat'l Inst. of Justice, U.S. Dep't of Justice, Postconviction DNA Testing: Recommendations for Handling Requests 105 (1999), *available at* http://www.ncjrs.org/pdffiles1/nij/177626.pdf [hereinafter Recommendations]. For an extensive review of the types of DNA testing used in forensic facilities today, including STR

skin, blood, hair, or semen are left at a crime scene.[27] While biological evidence has been of forensic significance for years through conventional serology testing, DNA testing has made this type of evidence of far greater significance because of its ability to positively exclude, or with a very high degree of accuracy include, a specific individual as the source of critical biological evidence from a crime scene.[28]

1. The Use of DNA Testing to Convict

Because of its unparalleled accuracy in identifying the source of biological material, DNA testing has proven to be a powerful tool in the fight against crime.[29] The nation's federal and state DNA databanks, which contain inventories of DNA profiles from new and old unsolved cases and from convicted offenders, are being used systematically to solve crimes at an unprecedented rate.[30] For example, as of June 2004, Virginia investigators had accumulated 2000 "cold hits"[31] using the state's DNA databank, which was established in 1989.[32] Furthermore, DNA testing has proven to be such an effective law enforcement tool that two-thirds of prosecutors' offices reportedly use DNA evidence during plea negotiations

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testing, mtDNA testing, and Y-DNA testing, see *id.* at 26-29; Nat'l Inst. of Justice, U.S. Dep't of Justice, Using DNA to Solve Cold Cases 5-7 (2002), *available at* http://www.ncjrs.org/pdffiles1/nij/194197.pdf.

27. Recommendations, *supra* note 26, at 1.

28. *See* Goldberg & Siegel, *supra* note 24, at 391 n.1.

29. Indeed, proponents of DNA testing, many of whom are defense attorneys, often hail the benefits of DNA technology as a crime-fighting tool just as much as a means to prove innocence. *See, e.g., Protecting the Innocent: Proposals to Reform the Death Penalty: Testimony of Prof. Barry Scheck, Co-director of the Innocence Project, and Member of N.Y. State's Forensic Science Review Board*, 107th Cong. 230 (2002) [hereinafter *Protecting the Innocent*] (stating how, as a commissioner on New York State's Forensic Science Review Board, he spent significant time training and urging law enforcement to focus on old, "cold" cases that could now be solved using DNA testing).

30. *See* Recommendations, *supra* note 26, at 1; *see also* Advancing Justice, *supra* note 23.

31. A "cold hit" occurs when a DNA profile developed from any biological fluid, tissue, or hair recovered from a crime scene is matched to an individual in the state's convicted offender DNA databank. Press Release, Governor Mark Warner's Office, Virginia's DNA Databank Scores 2,000th Hit (June 3, 2004), *available at* http://www.governor.virginia.gov/Press_Policy/Releases/2004/Jun04/0603.htm.

32. *Id.*

and felony trials.[33] Moreover, only one percent of prosecutors report having had any difficulty in admitting inculpatory DNA evidence at trial.[34]

2. The Use of DNA Testing to Prove Innocence: Pretrial Exclusions and Post-conviction Exonerations

DNA testing is not only used to convict the guilty, but also to identify the wrongly accused and convicted.[35] Crime laboratories estimate that, in cases where the police request a comparison of DNA evidence from an unsolved crime to a DNA sample from a known potential suspect, the analysis excludes the suspect identified by investigators in approximately one-third of the cases.[36] In 1995, the National Institute of Justice surveyed nineteen public and private laboratories that conducted DNA analysis comparing evidence from unsolved crimes to DNA samples from known suspects.[37] The results of this study indicate that police identified an innocent person as a prime suspect in approximately one in four cases,[38] results which

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33. Carol J. DeFrances, Bureau of Justice Statistics, U.S. Dep't of Justice, National Survey of Prosecutors: Prosecutors in State Courts, 2001, at 8-9 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/psc01.pdf. Of the 2140 state prosecutor's offices surveyed by the Department of Justice, all of the full-time large offices, 98% of full-time medium offices, 73% of full-time small offices, and 38% of part-time offices reported using DNA evidence during plea negotiations or felony trials. *Id.* at 8. This is a significant increase from 1996, when approximately half of all prosecutors' offices reported using DNA evidence during plea negotiations or felony trials. *Id.*

34. *Id.* at 9. *But see* People v. Castro, 545 N.Y.S.2d 985, 997-98 (Sup. Ct. Bronx County 1989) (holding that DNA evidence of exclusion is presumptively more admissible than DNA evidence of inclusion).

35. *See* Recommendations, *supra* note 26, at 2.

36. Nicholas P. Lovrich et al., National Forensic DNA Study Report 68 (2003), *available at* http://www.ncjrs.org/pdffiles1/nij/grants/203970.pdf.

37. Edward Connors et al., Nat'l Inst. of Justice, U.S. Dep't of Justice, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial 20 (1996), *available at* http://www.ncjrs.gov/pdffiles1/dnaevid.pdf [hereinafter Convicted by Juries]. Of the forty laboratories initially contacted by the National Institute of Justice, only the data from nineteen were sufficient for the purposes of the study. The nineteen consisted of thirteen state and local laboratories, four private laboratories, an armed forces laboratory, and the Federal Bureau of Investigation's laboratory. *Id.*

38. *Id.* An additional 16% of the cases yielded inconclusive results, often because the test samples had deteriorated or were too small to be tested. *Id.* Inconclusive results aside, the Federal Bureau of Investigation ("FBI") reported that, in the 10,060 cases it received, DNA test results were approximately 20% exclusive and 20% inconclusive. *Id.* The remaining eighteen laboratories, contributing data from a total of 11,561 cases, reported about 26% exclusive and 13% inconclusive DNA test results. *Id.* Omitting inconclusive cases, the exclusion rate for the FBI would be approximately 25%, and the average exclusion rate for the remaining eighteen laboratories would be about 30%. *See id.*; *see also* George C. Thomas III et al., *Is It Ever Too Late for Innocence? Finality, Efficiency, and Claims of Innocence*, 64 U. Pitt. L. Rev. 263, 271-72 (2003). Admittedly, these results must be interpreted with caution, as there is no information given about the types of cases in the sample. For example, it is possible that testing is only performed in cases in which law enforcement has little or no other evidence, a category of cases that likely contains more innocent suspects. Thomas et al., *supra*, at 272. It may also be true that crimes that lend themselves to DNA testing (e.g., sexual assaults) are more likely to result in charges against

"strongly suggest[] that postarrest and postconviction DNA exonerations are tied to some strong, underlying systemic problems that generate erroneous accusations and convictions."[39]

To date, the results of DNA testing have exonerated 163 people of the crime or crimes for which they were wrongfully convicted.[40] These exonerations illustrate that DNA testing is a far more reliable and precise method of identifying perpetrators of crime than any other form of identification proof utilized by law enforcement, including eyewitness identification,[41] confessions,[42] and more traditional forensic science

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innocent suspects. *Id.* However, law enforcement has "a powerful incentive to seek DNA testing in all cases" in which there is biological evidence, because if DNA test results positively identify the suspect as the perpetrator, the State's case is strengthened immensely. *Id.* It should also be noted that DNA testing is increasingly being used to solve property crimes, not just those crimes that are traditionally thought of as appropriate for DNA testing, such as sexual assaults. *See, e.g.*, Bill Hughes & Richard Liebson, *Look Out, Burglars, DNA's on the Scene*, J. News (Westchester County, NY), Apr. 2, 2004, at 1A (reporting that a New York man was convicted of burglary after saliva left on the rim of a soda bottle found at the crime scene matched a profile in New York's convicted offender databank).

39. Convicted by Juries, *supra* note 37, at xxviii-xxix. See also infra notes 41-44 and accompanying text for an examination of some of the identified causes of wrongful convictions.

40. *See* The Innocence Project, *supra* note 21. Fourteen of those exonerated had at one time been sentenced to death. *See* Death Penalty Information Center, Innocence and the Crisis in the American Death Penalty, http://www.deathpenaltyinfo.org/article.php?did=1149&scid=45 (last visited Sept. 28, 2005). Certainly, concerns about wrongful convictions did not arise with the advent of forensic DNA testing; for many years scholars have investigated this problem. Keith A. Findley, *Learning from Our Mistakes: A Criminal Justice Commission to Study Wrongful Convictions*, 38 Cal. W. L. Rev. 333, 335 (2002). In 1932, Edward Borchard identified sixty-five wrongful convictions. Edwin M. Borchard, Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice (1932). By 1987, Hugo Bedau and Michael Radelet had identified 350 wrongful convictions in cases where the convicted person could have faced the death penalty. Hugo Adam Bedau & Michael L. Radelet, *Miscarriage of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 23-24 (1987). By 1992, that number had increased to over 400 such cases. *See* Michael L. Radelet et al., In Spite of Innocence: Erroneous Convictions in Capital Cases 272 (1992). For an extensive review of the scholarship identifying wrongful convictions, see Adele Bernhard, *When Justice Fails: Indemnification for Unjust Conviction, in* University of Chicago Law School Roundtable 73, 75-80 (1999). It is also important to note that in about half of the cases in which post-conviction DNA testing is conducted, the test results further implicate the defendant. The Innocence Project, DNA News: Post-Conviction DNA Testing that Confirms Guilt, http://innocenceproject.org/dnanews/index.php (last visited Sept. 28, 2005). For example, Steven Holcomb was convicted of raping a thirteen-year-old girl in 1985. Angela Rozas, *Lawyers Halt Bid to Clear Inmate: DNA Test Links Convicted Rapist*, Chi. Trib., Oct. 30, 2003, at 3. Post-conviction DNA testing conducted in 2002 on biological evidence from the case resulted in a positive match to Holcomb. *Id.*

41. In approximately two-thirds of the post-conviction DNA exonerations to date, mistaken eyewitness identifications played a large part in the original convictions. *See* The Innocence Project, Causes & Remedies: Mistaken I.D., http://innocenceproject.org/causes/mistakenid.php (last visited Sept. 28, 2005). DNA testing has demonstrated that single and even multiple eyewitness identifications can be erroneous. *See id.* For example, Kirk Bloodsworth was convicted in 1985 for the 1984 sexual assault and murder of a nine-year-old girl. Convicted by Juries, *supra* note 37, at 35-37. Bloodsworth's conviction rested in large part on the testimony of five eyewitnesses, who

methods such as conventional serology[43] analysis.[44] Furthermore, the use of DNA technology brings to post-conviction proceedings a degree of

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stated at trial that they had seen Bloodsworth with the victim prior to her murder. *Id.* at 36. However, the results of post-conviction DNA testing performed in 1992 on the biological evidence from this case excluded Bloodsworth as the source of the sperm found on the victim's underwear and demonstrated that the five eyewitnesses were wrong. *Id.* at 36-37. In 1993, Bloodsworth was exonerated after serving over eight years in prison, two of which were spent on death row. Paul W. Valentine, *Jailed for Murder, Freed by DNA: Md. Waterman, Twice Convicted in Child's Death, Is Released*, Wash. Post, June 29, 1993, at A1. Furthermore, in 2003 the DNA profile matched that of a convicted sex offender whose profile was in a state DNA databank and who was in prison for an attempted rape and murder he committed just three weeks after the nine-year-old girl's murder. Stephanie Hanes, *'84 Investigation Quick to Overlook the Culprit*, Balt. Sun, May 22, 2004, at 1A; Andrea F. Siegel, *Taking Felons' DNA in Dispute*, Balt. Sun, June 7, 2004, at B1. For a powerful account of a rape victim's certainty in identifying her attacker, which post-conviction DNA testing later proved to be mistaken, see Jennifer Thompson, Op-Ed., *I Was Certain, But I Was Wrong*, N.Y. Times, June 18, 2000, at 15.

42. Confessions are universally considered compelling evidence of guilt. Richard A. Leo & Richard J. Ofshe, *The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation*, 88 J. Crim. L. & Criminology 429, 429 (1998). However, of the 163 people exonerated by DNA evidence, at least thirty-three were originally convicted at least in part on the basis of their false confessions. The Innocence Project, Case Profiles, http://innocenceproject.org/case/index.php (last visited Sept. 28, 2005). The post-conviction DNA exoneration cases in which defendants made incriminating statements or delivered outright confessions demonstrate that a confession or admission is not always prompted by internal knowledge or guilt, but instead may be motivated by external influences. The Innocence Project, Causes & Remedies: False Confessions, http://innocenceproject.org/causes/falseconfessions.php (last visited Sept. 28, 2005). Duress and coercion are among the many factors that have led to false confessions. *Id.* For example, Christopher Ochoa not only confessed to raping and killing a coworker, but also implicated his friend Richard Danziger in the crime. Terrence Stutz, *Freedom's Embrace: 12-Year Prison Ordeal Ends for Man Cleared by DNA Evidence*, Dallas Morning News, Jan. 17, 2001, at 1A. However, DNA testing on samples retained from the time of their 1989 trials not only excluded both Ochoa and Danziger as sources of the biological evidence left by the perpetrator, but also identified the true murderer. *Id.* Ochoa stated that his confession and implication of Danziger were the results of police pressure and fear of the death penalty, citing periods of time when the police threatened him with the consequences of not confessing. *Id.* The exoneration in 2002 of the five teenagers who confessed to and were convicted of raping, beating, and robbing the "Central Park Jogger" in 1989 further exposed the prevalence of false confessions. *See* People v. Wise, 752 N.Y.S.2d 837 (Sup. Ct. N.Y. County 2002). Soon after the exonerations in the Central Park Jogger case, the American Bar Association unanimously accepted a resolution that urges law enforcement agencies around the country to videotape interrogations of criminal suspects to reduce the possibility of coerced confessions. Susan Saulny, *National Law Group Endorses Videotaping of Interrogations*, N.Y. Times, Feb. 10, 2004, at B4.

43. Prior to the application of DNA testing to the criminal justice system, forensic scientists were limited to the use of conventional serology analysis. The Innocence Project, Causes and Remedies: Serology, http://innocenceproject.org/causes/serology.php (last visited Sept. 28, 2005). The term "conventional serology" refers to both ABO blood typing and microscopic hair analysis, among other things. *Id.* ABO blood typing is a test that uses antibodies to detect variations on the surface of human red blood cells and can be performed on liquid or stains from a variety of bodily fluids (e.g., blood, saliva, semen, and vaginal secretions). Recommendations, *supra* note 26, at 67. Humans have either A, B, O, or AB blood types, and one out of every three randomly selected pairs of individuals have the same blood type. *Id.* For this reason, the National Institute of Justice recommends post-conviction

certainty to which neither the defense nor the prosecution is accustomed.[45] In traditional appeals, the possibility that an original verdict will be overturned is only suggested.[46] By contrast, the introduction of DNA evidence post-conviction may definitively prove innocence.[47]

The purpose of post-conviction DNA analysis is to use advanced scientific technology to test the State's identification proof—proof which a jury, and reviewing courts, have already determined to be beyond a

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DNA testing on evidence that was previously subjected only to blood typing analysis at the time of trial, because "ABO blood testing . . . results alone are not sufficiently discriminating such that a falsely accused individual would necessarily be excluded" using these tests. *Id.* at 24. For example, in 1981 Calvin Willis was convicted and sentenced to life in prison for the rape of a ten-year-old girl in Louisiana. His conviction was based partly on the results of conventional serology analysis, which could not exclude Willis, a type O secretor, as the contributor of seminal fluid with type O markers found on the victim's nightgown, in the victim's underwear, and on a bedspread. *See* The Innocence Project, Case Profiles: Calvin Willis, http://innocenceproject.org/case/display_profile.php?id=138 (last visited Sept. 28, 2005). In 2003, however, Willis was exonerated after the results of post-conviction DNA testing showed that he was in fact not the source of the semen. *Id.* Before the advent of mitochondrial DNA testing, forensic scientists examined hair under a microscope for varying and similar characteristics. *See* The Innocence Project, Causes and Remedies: Serology, *supra*. Although this practice is highly subjective and very inaccurate with regard to including or "matching" a suspect, hair analysis often determined the outcome of a trial due to overstated statistics or the exaggeration of the probative value of microscopic hair analysis. *Id.* The case of Jimmy Ray Bromgard illustrates how post-conviction DNA testing has exposed the weakness of hair comparison evidence. Bromgard was convicted of the 1987 rape of an eight-year-old girl, largely on the basis of testimony from the director of the Montana State Crime Laboratory that head and pubic hairs found at the crime scene were indistinguishable from Bromgard's hairs, and that there was a "1 in 10,000" chance that Bromgard was not the source of both sets of hairs. Adam Liptak, *2 States to Review Lab Work of Expert Who Erred on ID*, N.Y. Times, Dec. 19, 2002, at A24. In 2002, however, Bromgard was exonerated through the results of post-conviction DNA testing, and his exoneration triggered a review by state authorities of the work of the forensic scientist who testified at Bromgard's trial. *Id.* The recent holding of a U.S. district court that testimony regarding microscopic hair analysis was inadmissible under the Daubert standard is further evidence that microscopic hair analysis is now considered unreliable. *See* Williamson v. Reynolds, 904 F. Supp. 1529, 1556 (E.D. Okla. 1995).

44. For studies that have identified the recurring factors which have contributed to wrongful convictions, see, e.g., Convicted by Juries, *supra* note 37, at 15-18 (finding that the major factors that led to the wrongful conviction of twenty-eight innocent people who were eventually exonerated through DNA testing include: erroneous eyewitness identification, reliance on erroneous or misleading forensic evidence, and alleged governmental misconduct); Barry Scheck et al., Actual Innocence: When Justice Goes Wrong and How to Make It Right 365 (2003) (concluding that, of 130 DNA-based exonerations in the United States, mistaken eyewitness identification was a factor in 78% of the cases; false confessions were present in 27%; jailhouse informants played a role in 16%; microscopic hair inclusions were a factor in 16%; and 3% involved DNA inclusion at trial); Michael J. Saks et al., *Toward a Model for the Prevention and Remedy of Erroneous Convictions*, 35 New Eng. L. Rev. 669, 671 (2001) (finding that, of eighty-one DNA exoneration cases, 74% involved mistaken eyewitness identification; 65% involved erroneous forensic evidence; 39.5% involved prosecutorial misconduct; 32% involved police misconduct; 31% involved fraudulent or tainted evidence; 28% involved bad lawyering; 19% involved false confessions; 17% involved informant testimony; and 17% involved false witness testimony).

45. Recommendations, *supra* note 26, at vi.

46. *Id.*

47. *Id.*

reasonable doubt—to determine if a wrongful conviction has occurred.[48] In many cases where convictions appeared to be based on solid, and in some cases overwhelming, evidence, results of post-conviction DNA testing have proven actual innocence.[49] Indeed, without DNA testing, many of these cases would never have been given any attention.[50]

As the above analysis illustrates, no other evidence used in the criminal justice system rivals DNA's "broadly applicable and uniquely dispositive power."[51] In light of this, the DNA revolution and the resulting exonerations have put the spotlight on prosecutors' treatment of innocence-based post-conviction motions.[52] The next section will detail how some prosecutors oppose post-conviction claims of innocence based on exculpatory DNA test results.

B. *Prosecutors Challenge the Significance of Exculpatory Post-conviction DNA Test Results in Light of Other Evidence of Guilt*

Few prosecutors directly assert that the judicial system should permit the incarceration of innocent people.[53] In fact, some prosecutors have initiated programs to review past convictions and subject any remaining biological evidence to DNA testing to ascertain whether an inmate was wrongly convicted.[54] Furthermore, approximately half of the 163 DNA exonerees obtained post-conviction DNA testing with the consent of local prosecutors.[55]

However, while there is no doubt that DNA technology has had a profound impact on the criminal justice system, the system in which DNA-based post-conviction claims of innocence are brought is the same adversarial system that led to the original convictions and in which all other post-conviction claims are litigated.[56] Proponents of post-conviction DNA testing argue that, as a result of the adversarial environment in which these cases are litigated, many prosecutors exhibit indifference and, on occasion, hostility to requests for and in reaction to the results of post-conviction DNA testing.[57]

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48. *See generally* Convicted by Juries, *supra* note 37.

49. *Double Helix*, *supra* note 25, at 595; *see also* Editorial, *Yet Another DNA Exoneration*, Wash. Post, Feb. 18, 2002, at A22.

50. *See* Findley, *supra* note 40, at 336.

51. *Double Helix*, *supra* note 25, at 595.

52. Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. Rev. 125, 133 (2004).

53. *Double Helix*, *supra* note 25, at 553.

54. *See id.* at 557-59 (detailing the proactive efforts of prosecutors in San Diego, Minnesota, and Orange County, California to review cases prosecuted before DNA was used routinely by law enforcement in an attempt to identify any individuals who were wrongfully convicted).

55. *See* The Innocence Project, Causes and Remedies: DNA, *supra* note 22.

56. Goldberg & Siegel, *supra* note 24, at 393.

57. *See* Medwed, *supra* note 52, at 129. For example, the deputy commonwealth's attorney who handles requests for post-conviction DNA testing in Suffolk, Virginia has said that it is his policy to "oppose them all," regardless of the merits of the request. Michelle

For example, Florida prosecutors vigorously opposed Wilton Dedge's efforts to prove his innocence of a 1982 rape for which he was convicted. Initially, prosecutors opposed, on procedural grounds, Dedge's attempts to obtain mitochondrial DNA testing on pubic hairs found in the rape victim's bed, which prosecutors told the jury were Dedge's at his trial.[58] Over the protests of prosecutors, however, a court granted Dedge access to the pubic hairs in 2000, and DNA test results indicated that the hairs did not originate from Dedge.[59] Nevertheless, for three additional years the State opposed Dedge's motion for a new trial on the basis of the exculpatory test results.[60] Specifically, prosecutors changed their strategy from trial and argued that the pubic hairs were insignificant,[61] and thus the DNA test results were insufficient to overcome the other evidence linking Dedge to the crime—namely, the victim's identification of Dedge and the alleged confession Dedge gave to a jailhouse informant who testified against him at trial.[62] The State did not relent in its opposition until the results of a second set of DNA tests, conducted in 2004 on semen samples from the case long believed to be too degraded for testing, conclusively excluded Dedge as the

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Washington & Tim McGlone, *Warner Weighs Plan to Test Crime DNA*, Virginian-Pilot, Sept. 4, 2004, at A16. In Virginia Beach, Virginia, prosecutors opposed six of the seven DNA test requests received since the state's post-conviction DNA testing statute was passed in 2001. *Id.* This behavior is surprising, to say the least, considering that the results of post-conviction DNA testing have exonerated eight men of rape and/or murder convictions in Virginia. *Id.* In fact, David Vasquez of Virginia was the one of the first people in the country who was exonerated through post-conviction DNA testing. *See* The Innocence Project, Case Profiles, *supra* note 42.

58. Martin Dyckman, *Infamous Justice*, St. Petersburg Times, Aug. 22, 2004, at 1P. Specifically, the State argued that, under longstanding court rules, it was too late for Dedge to get his conviction overturned—even if Dedge was not the source of the biological evidence from this case. *Id.* In fact, an assistant attorney general went so far as to say that, even if she knew Dedge was innocent, it would not change the belief that his requests must be denied because they were procedurally barred. *Id.* The State also argued that Dedge's lawyers should have requested DNA testing much earlier, and added that it was up to the courts—not the State—to waive Florida's two-year time rule and release the evidence for testing. Sydney P. Freedberg, *DNA Testing Denied to Inmates Seeking Justice*, St. Petersburg Times, June 21, 1999, at 1A.

59. Laurin Sellers, *DNA Test Prompts Brevard Man to Seek 3rd Trial*, Orlando Sentinel, July 15, 2002, at A1.

60. Editorial, *Innocence Lost*, St. Petersburg Times, Aug. 22, 2004, at 2P.

61. *Id.* At trial, prosecutors presented expert testimony that pubic hairs found in the victim's bed were microscopically identical to Dedge's and could be his; furthermore, prosecutors argued to the jury in their closing argument that the man who committed the crime "would have pubic hair identical to Wilton Dedge—Dedge's pubic hairs." Sellers, *supra* note 59.

62. *See* Sellers, *supra* note 59. The State also reiterated its belief that, regardless of the results, the DNA test results should not be considered because the testing occurred before the enactment of statutory rules on DNA testing, and that, in the interest of finality, Dedge should remain in prison regardless of whether he did the crime or not. *Innocence Lost*, *supra* note 60.

rapist.[63] Dedge was released from a Florida prison on August 12, 2004, after spending twenty-two years in prison for a crime he did not commit.[64]

Defense attorneys have tried various measures to prevent prosecutors from reversing course and changing their stories from trial when opposing DNA-based post-conviction claims of innocence. Specifically, defense attorneys have utilized two novel legal approaches to this problem, albeit with limited success thus far.[65] First, defense attorneys argue that DNA-based post-conviction motions for relief are more appropriately analyzed under the harmless error doctrine than the newly discovered evidence test.[66] Secondly, defense attorneys request that courts apply the doctrine of judicial estoppel to bar prosecutors from making arguments that are inconsistent with the theory of the case presented at trial.[67]

The next section will introduce the newly discovered evidence test, under which courts currently analyze DNA-based post-conviction claims of innocence. The next part will also introduce the harmless error doctrine, which courts use to analyze claims of constitutional error at trial.

C. *Standard of Review*

Currently, most courts analyze DNA-based post-conviction claims of innocence under the newly discovered evidence test.[68] To warrant the granting of a new trial on the grounds of newly discovered evidence, the convicted offender must show that the evidence: (1) has been discovered since the trial; (2) could not have been discovered before the trial by the exercise of due diligence; (3) is material to the issue; (4) is not merely cumulative or impeaching; and (5) will probably change the result if a new trial is granted.[69] The question of whether the evidence would probably change the result if a new trial were granted is what is typically litigated in post-conviction proceedings where the new evidence the petitioner seeks to introduce are the results of post-conviction DNA testing, and it is under this

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63. *See Innocence Lost*, *supra* note 60.

64. *See* Dyckman, *supra* note 58. Dedge was the 147th DNA exoneree. In the fourteen months since Dedge's exoneration, DNA test results have been used to exonerate sixteen additional prisoners. *See* The Innocence Project, http://innocenceproject.org/case/display_cases.php?sort=year_exoneration&start=141&end=160 (last visited Sept. 28, 2005); The Innocence Project, http://innocenceproject.org/case/display_cases.php?sort=year_exoneration&start=161&end=163 (last visited Oct. 11, 2005).

65. *See* Defendant's Petition for Review and Appeal at 12, State v. Armstrong, 2005 WI 119, 700 N.W.2d 98 (Nos. 01-2789 & 02-2979), 2005 Wisc. LEXIS 356 [hereinafter Petition for Review] (copy on file with the Fordham Law Review).

66. *See* State v. Armstrong, Nos. 01-2789 & 02-2979, 2004 Wisc. App. LEXIS 453, at **21 (Wis. Ct. App. May 27, 2004), *rev'd on other grounds*, 2005 WI 119, 700 N.W.2d 98; *see also* Petition for Review, *supra* note 65, at 24-25.

67. *See Armstrong*, 2004 Wisc. App. Lexis 453 at **18-19.

68. *See id.* at **21-23.

69. 58 Am. Jur. 2d *New Trial* § 312 (2002); *see also* United States v. Schwartzbaum, 527 F.2d 249 (2d Cir. 1975); United States v. Bostic, 360 F. Supp. 1305 (E.D. Pa. 1973); United States v. Puco, 338 F. Supp. 1252 (S.D.N.Y. 1972).

prong of the newly discovered evidence test that prosecutors justify their attempts to introduce new theories of the crime.[70] Specifically, prosecutors argue that they are permitted to present new theories of the crime to refute the petitioner's contention that the DNA evidence would result in a different outcome if admitted at a new trial.[71]

To prevent prosecutors from being able to introduce new theories of the crime in post-conviction proceedings, defense attorneys have advocated that courts adopt a new standard of review, analogous to the harmless error[72] test, for those cases in which a petitioner introduces DNA evidence that demonstrates that the trial court admitted erroneous scientific evidence.[73] Under the proposed test, the State would bear the burden of proving that the introduction at trial of forensic evidence implicating the defendant as the perpetrator of the crime, which post-conviction DNA testing proves did not actually originate from the defendant, did not affect the jury's decision to find the petitioner guilty.[74] Imposing such a burden on the State would potentially have the practical effect of compelling the State to argue within the bounds of the theory it introduced at trial. However, although at least one court has recognized that there are compelling reasons why the harmless error doctrine is a more appropriate test for analyzing these particular post-conviction claims of innocence, no court has yet adopted this as the standard of review for this discrete category of case.[75]

The next section introduces another approach defense attorneys have undertaken in an attempt to make prosecutors stick to their stories from trial when the results of post-conviction DNA testing are exculpatory: requesting that the court judicially estop prosecutors from presenting a position in post-conviction proceedings that is inconsistent with what the State argued at trial.

D. *Judicial Estoppel*

Defense attorneys have recently begun to request that courts apply the doctrine of judicial estoppel against the State to bar prosecutors from

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70. *See* Commonwealth v. Reese, 663 A.2d 206, 209 (Pa. Super. Ct. 1995).

71. *Id.*

72. Harmless error is defined as "any error, defect, irregularity or variance that does not affect substantial rights." Fed. R. Crim. P. 52. Federal Rule of Criminal Procedure 52 directs that such errors "must be disregarded." *Id.* The Supreme Court has held that the appropriate test for determining whether a technical error is harmless—that is, non-prejudicial—is whether the reviewing court can say with fair assurance, after considering all the circumstances, that the judgment was not substantially affected by the error. *See, e.g.*, Kotteakos v. United States, 328 U.S. 750, 765 (1946). Thus, when reviewing a jury trial, the court must consider what effect the error had or reasonably may have had upon the jury's decision, not whether the jury was right in its judgment regardless of the error. *Id.*

73. *See* Armstrong, 2004 Wisc. App. LEXIS 453 at **21-22.

74. *Id.* at **21.

75. *See id.* For a discussion of the court's reluctance to apply the harmless error doctrine in the case of State v. Armstrong, see *infra* Part II.C.3.

making arguments in post-conviction proceedings that are contrary to the theory of the case introduced at trial.

1. The Policy Underlying the Application of Judicial Estoppel

Judicial estoppel is a doctrine that "prevents a party from contradicting previous declarations made during the same or an earlier proceeding if the change in position would adversely affect the proceeding or constitute a fraud on the court."[76] Courts' invocation of the doctrine generally precludes a party from prevailing in one phase of a case on one argument and then relying on a contradictory argument to prevail in another phase of the same litigation.[77]

Protecting the integrity of the judicial process is the universally recognized purpose of judicial estoppel,[78] and courts' use of the doctrine accomplishes this goal by "prohibiting parties from deliberately changing positions according to the exigencies of the moment."[79] Because the rule is intended to prevent the improper use of the judicial system, judicial estoppel is an equitable doctrine invoked by a court at its discretion.[80]

The use of judicial estoppel advances several policy aims.[81] First, courts invoke the doctrine to preserve the sanctity of litigants' oath.[82] In order to avoid the appearance of condoning the behavior of a party who takes its oath lightly, courts bind parties to what they have said in judicial proceedings.[83] Second, courts invoke the doctrine "to avoid the incongruity of inconsistent decisions between courts,"[84] and because allowing inconsistent positions is thought to bring the judicial system into disrepute; the use of judicial estoppel thus "'safeguard[s] the administration of justice . . . and thereby preserve[s] the public confidence in the purity and

76. Black's Law Dictionary 590-91 (8th ed. 2004); *see also* Wabash Grain, Inc. v. Smith, 700 N.E.2d 234, 237 (Ind. Ct. App. 1998) (observing that judicial estoppel prevents a party from asserting a position in a legal proceeding inconsistent with one previously asserted).

77. Pegram v. Herdrich, 530 U.S. 211, 227 n.8 (2000); *see also* 18 James Wm. Moore et al., Moore's Federal Practice § 134.30 (3d ed. 1997) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding."); 18B Charles Alan Wright et al., Federal Practice and Procedure § 4477 (2d ed. 2002) ("Absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.").

78. *See* 18 Moore et al., *supra* note 77, § 134.31.

79. New Hampshire v. Maine, 532 U.S. 742, 749-50 (2001) (citations omitted).

80. *Id.* at 750.

81. Ashley S. Deeks, Comment, *Raising the Cost of Lying: Rethinking* Erie *for Judicial Estoppel*, 64 U. Chi. L. Rev. 873, 875 (1997).

82. *See* Konstantinidis v. Chen, 626 F.2d 933, 937 (D.C. Cir. 1980), *cited in* Deeks, *supra* note 81, at 875 n.5.

83. *Id.*; *see also* Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598-99 (6th Cir. 1982).

84. Deeks, *supra* note 81, at 875.

efficiency of judicial proceedings.'"[85] Additionally, courts apply judicial estoppel to avoid being misled by litigants; in this sense, the doctrine "operates to prevent a party from insulting a court through improper use of judicial machinery."[86] Courts also use judicial estoppel to prevent litigants from using the courts for undeserved personal gain; thus, for example, in civil cases courts invoke the doctrine to bar litigants from obtaining multiple recoveries from opponents or to present multiple theories until a court finally allows recovery based on one.[87] Finally, courts employ the doctrine to minimize the misuse of judicial resources by reducing the number of illegitimate claims they must hear.[88]

2. Judicial Estoppel in Civil Cases

Judicial estoppel is most often invoked in civil cases.[89] In the civil context, there is no "one size fits all" judicial estoppel rule,[90] and courts have observed that "'the circumstances under which judicial estoppel may appropriately be invoked are probably not reducible to any general formulation of principle.'"[91] Nevertheless, in civil cases, courts typically examine the following factors in determining whether to apply the doctrine in a particular case. First, a party's later position must be "'clearly inconsistent'" with its earlier position.[92] This is not limited to representations made by a party within the same legal proceedings, but rather applied to inconsistent claims raised by a party in separate or subsequent legal proceedings.[93] Second, courts ask whether the party has succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create "the perception that either the first or the second court was

85. Rand G. Boyers, *Precluding Inconsistent Statements: The Doctrine of Judicial Estoppel*, 80 Nw. U. L. Rev. 1244, 1245 (1986) (quoting Melton v. Anderson, 222 S.W.2d 666, 669 (Tenn. Ct. App. 1948)).

86. Deeks, *supra* note 81, at 875 (quoting *Konstantinidis*, 626 F.2d at 938).

87. *Id.* (citing McNemar v. Disney Store, Inc., 91 F.3d 610, 617-18 (3d Cir. 1996)). In *McNemar*, the court applied judicial estoppel against a plaintiff who had been granted disability benefits on the grounds that he was totally disabled, which barred him from recovering against his employer under the Americans with Disabilities Act on the grounds that he was terminated despite being a qualified person with a disability who could perform the essential functions of his job. 91 F.3d at 617-18.

88. Deeks, *supra* note 81, at 876.

89. *See* Smith v. State, 765 N.E.2d 578, 582-83 (Ind. 2002); Poulin, *supra* note 25, at 1451-52.

90. Hardy v. Hardy, No. 496-274, 1997 U.S. Dist. LEXIS 23938, at *14 (S.D. Ga. Oct. 6, 1997).

91. New Hampshire v. Maine, 532 U.S. 742, 750 (2001) (quoting Allen v. Zurich Ins. Co., 667 F.2d 1162, 1166 (4th Cir. 1982)).

92. *Id.* at 750 (quoting United States v. Hook, 195 F.3d 299, 306 (7th Cir. 1999)).

93. Wabash Grain, Inc. v. Smith, 700 N.E.2d 234, 238 n.7 (Ind. Ct. App. 1998) (citing 28 Am. Jur. 2d *Estoppel and Waiver* § 69 (1966) ("The rule against inconsistent positions applies generally to positions assumed not only in the course of the same action or proceeding, but also in proceedings supplemental thereto . . . and even in separate actions or proceedings involving the same parties and questions.")).

misled."[94] Without success in a prior proceeding, a party's later inconsistent position introduces no "risk of inconsistent court determinations,"[95] and thus poses little threat to judicial integrity.[96] A third factor courts consider is "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."[97]

There is no uniform stance on the specific types of behavior that threaten judicial integrity.[98] It has been suggested, however, that judicial estoppel "be applied with caution and in the narrowest of circumstances" to avoid impinging on the truth-seeking function of the court,[99] which can occur because the doctrine precludes the presentation of a contradictory position without examining the truth of either statement.[100] "Indeed, the courts appear consciously to leave the doctrine's boundaries vague, since 'it may be advisable not to prescribe too many rules for the application of a doctrine designed to protect the integrity of the courts.'"[101] Leaving the application of judicial estoppel to the courts' discretion thus permits each court to respond to the specific inconsistency targeted by the request for the invocation of the doctrine.[102]

3. Judicial Estoppel in Criminal Cases

Judicial estoppel is applied much less frequently in the criminal context than in civil cases.[103] On the rare occasions that the doctrine is invoked in criminal cases, it is typically applied against a defendant who asserts one position at trial and another on appeal.[104] Nevertheless, courts hearing criminal cases have indicated that the doctrine could be invoked to preclude

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94. *New Hampshire*, 532 U.S. at 750 (quoting Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982)).

95. *Id.* at 751 (quoting United States v. C.I.T. Constr. Inc., 944 F.2d 253, 259 (5th Cir. 1991)).

96. *Id.*; *see also Wabash*, 700 N.E.2d at 237-38; Deeks, *supra* note 81, at 873 ("Judicial estoppel . . . protects the integrity of the judicial process by preventing litigants from engaging in self-serving self-contradiction.").

97. *New Hampshire*, 532 U.S. at 751; *see also* Scarano v. Cent. R.R. Co. of N.J., 203 F.2d 510, 513 (3d Cir. 1953).

98. Poulin, *supra* note 25, at 1452.

99. Lamonds v. Gen. Motors Corp., 34 F. Supp. 2d 391, 394 (W.D. Va. 1999).

100. Vowers & Sons, Inc. v. Strasheim, 576 N.W.2d 817, 824 (Neb. 1998) (quoting Melcher v. Bank of Madison, 539 N.W.2d 837, 842 (Neb. 1995)).

101. Deeks, *supra* note 81, at 876 (quoting *In re* Cassidy, 892 F.2d 637, 642 (7th Cir. 1990)); *see also* Dush v. Appleton Elec. Co., 124 F.3d 957, 960 (8th Cir. 1997).

102. Poulin, *supra* note 25, at 1452.

103. *See* Smith v. State, 765 N.E.2d 578, 582-83 (Ind. 2002).

104. State v. Towery, 920 P.2d 290, 304 (Ariz. 1996); *see also* State v. Michels, 414 N.W.2d 311, 317 (Wis. Ct. App. 1987) (estopping a defendant who requested at trial the lesser included charge of manslaughter from arguing on appeal that there was insufficient evidence to support a conviction on that charge).

the State from changing its version of the facts of a case in separate proceedings involving the same matter,[105] because

> [a]ny other rule would permit absurd results. For example, if the state had evidence that a defendant admitted robbing *the* convenience store, absent judicial estoppel the state could use that evidence to convict the defendant of every convenience store robbery in the city, affirming the evidence as relevant in each case, all the while knowing that the defendant made only one admission of a single act.[106]

In general, courts condition the application of the doctrine in the criminal context on three requirements: (1) The parties must be the same, (2) the question or facts involved must be the same, and (3) the party asserting the inconsistent position must have been successful in the prior judicial proceeding.[107]

Although most jurisdictions theoretically allow the invocation of the doctrine against the State, in practice judicial estoppel offers little protection for criminal defendants[108] because most courts have resisted applying the doctrine in criminal cases.[109] Part II.D will examine the controversy of applying the doctrine in criminal cases, as well as the arguments for and against the use of the doctrine to limit the actions of prosecutors in innocence-based post-conviction proceedings.

II. DOES THE JUDICIAL SYSTEM PERMIT PROSECUTORS TO CHANGE THEIR STORY FROM TRIAL IN RESPONSE TO EXCULPATORY POST-CONVICTION DNA TEST RESULTS?

This part first describes the arguments prosecutors have made in opposition to convicted offenders' motions for a new trial on the basis of exculpatory post-conviction DNA test results, arguments which are arguably inconsistent with the theory of the crime presented by the State at the offenders' original trials. Part II.B reviews defense arguments against these prosecutorial tactics. Part II.C then describes how the new prosecution theories fare under the newly discovered evidence test, which traditionally governs the specific motions for post-conviction relief. Part II.C also analyzes a new standard, analogous to the harmless error doctrine, that is arguably a more appropriate standard under which these claims should be analyzed. Finally, Part II.D explores the arguments for and against applying judicial estoppel to prevent prosecutors from making arguments inconsistent with those which the State successfully maintained at trial.

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105. *Towery*, 920 P.2d at 304 (citing People v. Gayfield, 633 N.E.2d 919, 924-25 (Ill. App. Ct. 1994)); *see also* Russell v. Rolfs, 893 F.2d 1033, 1037-39 (9th Cir. 1990).

106. *Towery*, 920 P.2d at 304.

107. *Id.*; State v. Armstrong, Nos. 01-2789 & 02-2979, 2004 Wisc. App. LEXIS 453, at **19 (Wis. Ct. App. May 27, 2004), *rev'd on other grounds*, 2005 WI 119, 700 N.W.2d 98.

108. Poulin, *supra* note 25, at 1451-52.

109. *Id.* at 1452.

A. *Prosecutorial Arguments Contesting the Probative Value of Exculpatory Post-conviction DNA Test Results*

1. Exculpatory Post-conviction DNA Test Results Do Not Prove Innocence in Light of Other Evidence of Guilt

In an effort to maintain convictions they believe were based on sufficient evidence and to preserve limited resources for pending cases, prosecutors have made various arguments in opposing motions for new trials or for the vacatur of convictions when the results of DNA testing indicate that petitioners are innocent of the crime for which they were convicted.[110] For example, some prosecutors who relied on now-rudimentary forensic science (such as ABO blood typing or microscopic hair analysis) to convict a defendant argue that the results of state-of-the-art post-conviction DNA testing on the same biological evidence are not proof of innocence.[111] Although the prosecutors who make these arguments concede that DNA can prove whether someone is associated with a given piece of biological evidence, they insist that, in the context of post-conviction proceedings, this is not the same thing as proving whether or not a defendant committed a crime.[112] They argue that the power of DNA evidence must be reconsidered in the post-conviction context, contending that its usefulness to prove innocence is overstated in cases where there is other compelling evidence of guilt.[113]

Prosecutors made this sort of argument in opposition to Bruce Godschalk's claims of innocence. Godschalk was convicted in 1987 of two rapes, largely on the basis of his confession and serology evidence that Godschalk's blood type matched that of the semen recovered from the first rape victim.[114] In 2002, after eight years of protracted litigation to obtain DNA testing, two sets of DNA tests performed on the biological evidence from this case, including one performed by a laboratory chosen by the prosecution, excluded Godschalk as the source of the semen.[115] Regardless, the prosecutor initially refused to consent to Godschalk's release on the basis of the test results, explaining that although he had "no scientific basis" to disagree with the test results, he placed more trust in the

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110. *See, e.g.*, Kreimer & Rudovsky, *supra* note 25, at 610-11; Charles I. Lugosi, *Punishing the Factually Innocent: DNA, Habeas Corpus and Justice*, 12 Geo. Mason U. Civ. Rts. L.J. 233, 235 (2002); *see also* Medwed, *supra* note 52, at 132-69 (investigating the institutional, psychological, and political pressures prosecutors face to maintain convictions).

111. *See* Adam Liptak, *Prosecutors Fight DNA Use for Exoneration*, N.Y. Times, Aug. 29, 2003, at A1.

112. *See id.*

113. *See id.*; John Juhala, *False Exclusions?*, 37 Jurimetrics J. 325, 325-26 (1997). But see *supra* notes 41-42 on the problems with the other types of evidence prosecutors cite as sufficiently incriminating to justify upholding convictions despite exculpatory DNA test results.

114. *See* Kreimer & Rudovsky, *supra* note 25, at 548-49.

115. *See* Sara Rimer, *DNA Testing in Rape Cases Frees Prisoner After 15 Years*, N.Y. Times, Feb. 15, 2002, at A12.

"detective and [the] tape recorded confession."[116] According to the prosecutor, "the results must be flawed until someone proves . . . otherwise."[117]

In the case of Wilton Dedge, a Florida man who was recently released after serving twenty-two years in prison for a rape that he did not commit, the prosecutor argued that the exculpatory results from DNA testing performed on pubic hairs from the crime scene did not prove Dedge's innocence.[118] He did this despite asserting in his closing arguments at trial that the man who committed the crime "would have pubic hair identical to Wilton Dedge—Dedge's pubic hairs."[119] After the DNA testing, the prosecutor pointed to the victim's identification[120] and the testimony of an arguably unreliable jailhouse informant to argue that Dedge was guilty despite the exculpatory results.[121] In this case, prosecutors relented only after a second round of DNA tests excluded Dedge as the source of semen found in the victim.[122]

2. New Theories of the Crime Explain How a Convicted Person Is Guilty Despite Exculpatory DNA Test Results

Prosecutors also create new theories of how crimes occurred, which the State did not present to the judges and juries at the original trials, to explain how the person convicted of the crime is guilty despite post-conviction DNA test results that exclude the convicted offender as a source of the biological evidence left by the perpetrator at the crime scene or on the victim.[123] For example, prosecutors hypothesize about the existence of "unindicted co-ejaculators"[124] to explain how a defendant is guilty, even

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116. *See* Sara Rimer, *Convict's DNA Sways Labs, Not a Determined Prosecutor*, N.Y. Times, Feb. 6, 2002, at A14.

117. *See id.* The prosecutor ultimately consented to Godschalk's release, but not because he believed Godschalk was innocent; instead, the prosecutor said that on the basis of the DNA test results, he did not think there was sufficient evidence to convict Godschalk beyond a reasonable doubt, "and in this business a tie goes to the defendant." Rimer, *supra* note 115, at A12.

118. Sellers, *supra* note 59.

119. *Id.*

120. For a brief synopsis of the unreliability of eyewitness testimony, see *supra* note 41.

121. *See* Liptak, *supra* note 111.

122. *See* Dyckman, *supra* note 58; *Innocence Lost*, *supra* note 60.

123. *See* Lugosi, *supra* note 110, at 235.

124. *See Frontline: The Case for Innocence* (PBS television broadcast, Jan. 2000) (transcript available at http://www.pbs.org/wgbh/pages/frontline/shows/case/etc/script.html). Peter Neufeld, Codirector of the Innocence Project, articulates the theory of the "unindicted co-ejaculator" and other theories prosecutors have invented in response to exculpatory post-conviction DNA test results as follows:

> In almost all of [the Innocence Project] cases, the prosecutor's theory of the case was that one person alone seized the woman, raped her, and then left her. Once we get the DNA exclusion, a whole range of new prosecution theories emerge. There is the theory of the unindicted co-ejaculator. This is a person who obviously comes out of nowhere, and while our client is holding the woman down, this other person actually rapes the victim. Then there is the theory that, "Ah-ha! This

though the results of post-conviction DNA testing indicate that another man's sperm was found in the victim.[125] For example, when post-conviction DNA test results excluded Earl Washington as the source of the sperm found in the body of the woman he had been convicted of raping and murdering, prosecutors invoked the "unindicted co-ejaculator" theory and argued that some unidentified accomplice joined Washington in raping and killing the victim.[126] These arguments directly contradicted the State's reliance at trial on Washington's confession, which made no mention of any accomplice.[127] Further, this theory also contradicted a statement made by the victim to both her husband and a police officer before she died from injuries sustained in the attack that she had been raped by only one man.[128]

B. *Defense Arguments Asserting that Exculpatory Post-conviction DNA Test Results Prove Innocence*

1. The Contention that DNA Test Results Can Prove Guilt but Not Innocence Is a Double Standard

Critics of prosecutors who downplay the probative value of exculpatory post-conviction DNA test results argue that such prosecutors have created "a double standard[.] Evidence . . . considered more than sufficient by prosecutors if it establishes guilt [is] questionable or insufficient if it establishe[s] innocence."[129] Furthermore, the National Institute of

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> person wore a condom and, in fact, she had consensual sex with someone else shortly before." This theory is put forward even in the face of documentation where the victim told the doctors "I have not had any intercourse with anybody in the last 72 hours." Then there is the theory of a victim who's lying, because if all else fails, they've got to say their own victim is lying and she doesn't want to admit that she had some kind of illicit sex because she's married, because she has a boyfriend, because she's engaged, whatever. Even though the victim swears she didn't, even though there's no evidence that she did, they still throw this out there. And it's not—it's not believable, but that doesn't stop them from trying.

Id.; *see also supra* notes 9-11 and accompanying text (detailing the arguments made by prosecutors when the results of post-conviction DNA testing excluded Roy Criner as the source of the semen found in the victim's body).

125. *See* James S. Liebman, *The New Death Penalty Debate: What's DNA Got to Do with It?*, 33 Colum. Hum. Rts. L. Rev. 527, 543 (2002).

126. *See* Bill Miller, *Wilder Undecided on DNA-Based Plea for Pardon*, Wash. Post, Dec. 31, 1993, at D6; *Four Cases*, *supra* note 1.

127. *See* Frontline: The Case for Innocence: Earl Washington, Jr.: An Innocent Man, Excerpt from Petition for Executive Pardon (Dec. 20, 1993), http://www.pbs.org/wgbh/pages/frontline/shows/case/cases/petitionwashington.html. The governor of Virginia pardoned Washington on Oct. 2, 2000, after DNA testing found no trace of his DNA on any of the evidence from the crime scene. *See Four Cases*, *supra* note 1.

128. *See* Frontline: The Case for Innocence: Earl Washington, Jr.: An Innocent Man, Excerpt from Petition for Executive Pardon, *supra* note 127.

129. Liptak, *supra* note 111. See also *supra* notes 29-34 and accompanying text regarding the widespread use of DNA testing to convict.

Justice[130] has recognized that "DNA is a useful and neutral tool in the search for justice. It can cut both ways: DNA evidence can help prove innocence or guilt."[131] In fact, one court has suggested that DNA identification evidence of exclusion is presumptively more admissible than DNA identification evidence of inclusion.[132]

2. Defendants Argue that Prosecutors Should Not Be Allowed to Create New Theories of the Crime in the Face of Exculpatory Post-conviction DNA Test Results

Critics also argue that the State's creation of a new theory of the crime after conviction is, by definition, a concession that the prosecution's original theory was wrong and that the original trial verdict is thus unreliable.[133] Furthermore, defense attorneys and judges alike have argued that, if the results of post-conviction DNA testing are so compelling that they cast doubt on the theory of the case that the prosecution presented at trial, then at the very least a petitioner should be afforded a new trial, where the prosecution's new theory can be tested and accepted or rejected by a jury.[134]

C. *Standard of Review for Post-conviction Proceedings*

Prosecutors who make these arguments assert that they are legitimate, given the burden shifting that traditionally occurs post-conviction.[135] The post-conviction phase of a criminal case creates a role reversal for the

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130. The National Institute of Justice is the research, development, and evaluation agency of the U.S. Department of Justice. About NIJ, http://www.ojp.usdoj.gov/nij/about.htm (last visited Sept. 28, 2005).

131. Recommendations, *supra* note 26, at 107.

132. *See* People v. Castro, 545 N.Y.S.2d 985, 997-98 (Sup. Ct. Bronx County 1989) (holding that DNA test results could be used to show that blood on the defendant's watch was not his, but that test results could not be used to show that the blood was that of his alleged victims).

133. Petition for Review, *supra* note 65, at 29-30.

134. *See, e.g.*, Commonwealth v. Reese, 663 A.2d 206, 210 (Pa. Super. Ct. 1995); Petition for Review, *supra* note 65, at 28-29; *Baird Interview*, *supra* note 9. Judge Charles Baird of the Texas Court of Criminal Appeals dissented in the case of Roy Criner. *Id.* In an interview for the PBS documentary "Frontline: The Case for Innocence," Judge Baird stated,

> When the state prosecuted Mr. Criner, they theorized that Mr. Criner did not wear a condom, that he did ejaculate, and that his semen was recovered from the victim .... What they have done, and I think improperly so, is to create or invent reasons that explain away the DNA evidence. But those reasons were never presented to a jury, and that's the basis of the entire judicial system—you put those facts before 12 individual citizens, and let them decide if that evidence is reliable and believable, or not .... If the state thinks they have another theory of prosecution that they can prove beyond a reasonable doubt, then let them do that.

Id.

135. *See Frontline: The Case for Innocence: Interview with Barry Scheck* (PBS television broadcast May 1, 2003); *Keller Interview*, *supra* note 4.

respective parties.[136] During trial, the defendant is presumed innocent and the prosecution bears the burden of proof.[137] Once a defendant has been given a fair trial and convicted of the offense for which he was charged, however, the presumption of innocence disappears.[138] In the context of traditional post-conviction proceedings, then, the convicted offender is presumed guilty, and it is he or she who bears the burden of proving otherwise.[139]

Which party carries the burden of proof in innocence-based, and specifically DNA-based, post-conviction proceedings is not necessarily a settled issue. While DNA-based post-conviction claims of innocence are typically analyzed under the newly discovered evidence test, some defense attorneys argue that courts should analyze such claims under the harmless error standard.[140]

1. The Newly Discovered Evidence Test

In those jurisdictions in which DNA-based post-conviction claims of innocence are analyzed under the newly discovered evidence standard, convicted offenders bear the burden of proving, among other things, that the test results are truly exculpatory and would result in a different outcome if admitted at a new trial.[141] To refute petitioners' contention that the admission of exculpatory DNA test results would do just that, prosecutors present new theories of the crime or downplay the importance of the biological evidence in light of other evidence suggesting guilt,[142] and courts have largely allowed prosecutors to make such arguments in post-conviction proceedings.[143]

At least one court, however, has held that it would be improper to consider the State's alternative explanations for the presence of biological evidence, which post-conviction DNA test results demonstrate did not originate from the person convicted of the crime, in determining whether the admission of the DNA evidence would likely have resulted in a different verdict, because the jury did not hear this evidence at trial.[144] In

136. Goldberg & Siegel, *supra* note 24, at 410.

137. *Id.*

138. Herrera v. Collins, 506 U.S. 390, 399 (1993).

139. *See* Goldberg & Siegel, *supra* note 24, at 410.

140. *See, e.g.*, State v. Armstrong, Nos. 01-2789 & 02-2979, 2004 Wisc. App. LEXIS 453, at **22-23 (Wis. Ct. App. May 27, 2004), *rev'd on other grounds*, 2005 WI 119, 700 N.W.2d 98.

141. *See, e.g.*, People v. Dabbs, 587 N.Y.S.2d 90, 92 (Sup. Ct. 1991); Commonwealth v. Reese, 663 A.2d 206, 209 (Pa. Super. Ct. 1995); *Armstrong*, 2004 Wisc. App. LEXIS 453, at **22-24.

142. *See supra* notes 1-11 and accompanying text. *See generally Armstrong*, 2004 Wisc. App. LEXIS 453, at **18-19.

143. *See, e.g.*, *Keller Interview*, *supra* note 4 (discussing the Texas Court of Criminal Appeals consideration of the State's alternate explanations for the presence of semen that did not originate from Criner in denying Criner's motion for a new trial).

144. *See Reese*, 663 A.2d at 210.

Commonwealth v. Reese,[145] post-conviction DNA testing excluded the person who had been convicted of a rape as the source of seminal fluid found on the clothing worn by the victim on the night of the attack.[146] The petitioner moved for a new trial on the basis of these test results, which the Commonwealth opposed.[147] To rebut the petitioner's claims that the DNA test results were truly exculpatory, the Commonwealth argued that the evidence it sought to admit offered a "reasonable explanation as to why [the petitioner] was not linked through the DNA testing to the seminal fluid" found on the clothing that the victim was wearing the night she was attacked.[148] Specifically, the Commonwealth sought to offer evidence that the rapist did not ejaculate during the attack and that the victim was regularly engaging in sexual intercourse with her boyfriend at the time of the rape.[149] Finding that it would be improper for the court to consider these "explanations" in determining whether the DNA test results were truly exculpatory,[150] the court granted Reese's motion for a new trial, noting that the Commonwealth's proposed evidence may be appropriately admitted only as rebuttal testimony in a new trial.[151] In those jurisdictions where courts analyze DNA-based post-conviction claims of innocence under the newly discovered evidence test, petitioners, using the logic of the court's decision in *Reese*, argue that the very fact that prosecutors must change their theory of the crime to explain away the exculpatory results of DNA testing warrants the court granting the petitioner a new trial on the basis of newly discovered evidence.[152]

2. The Harmless Error Test—A More Appropriate Standard of Review?

In addition to arguing that courts should not consider evidence that the State never presented to a jury in considering a convicted offender's motion for a new trial under the newly discovered evidence test,[153] defense attorneys have argued alternatively that the newly discovered evidence test is inapplicable to the cases at issue, because this test applies only when evidence was not presented to the jury at trial.[154] By contrast, cases involving post-conviction DNA testing are distinguishable from other

145. *Id.* at 206.
146. *Id.* at 207.
147. *Id.*
148. *Id.* at 209.
149. *Id.* The State sought to offer evidence from the police who spoke to the victim after the attack and were told by her that the "assailant complained to her that he was unable to ejaculate during the assault." *Id.* The State also sought to have the reviewing court hear testimony from the victim herself. *Id.*
150. *Id.* at 210.
151. *Id.* For an argument as to why courts that apply the newly discovered evidence test should adopt the logic of the court in *Reese*, see *infra* Part III.A.1.
152. *Cf.* Petition for Review, *supra* note 65, at 28-29.
153. *See supra* note 151 and accompanying text.
154. *See* State v. Armstrong, Nos. 01-2789 & 02-2979, 2004 Wisc. App. LEXIS 453, at **21 (Wis. Ct. App. May 27, 2004), *rev'd on other grounds*, 2005 WI 119, 700 N.W.2d 98.

instances of newly discovered evidence in that the physical evidence was previously presented to a jury and linked to the defendant, and the results of post-conviction DNA testing on that evidence indicates that it did not originate from the petitioner.[155] Furthermore, many newly discovered evidence statutes have strict temporal restrictions on new trial motions,[156] which can prove fatal to the claims of those defendants who were convicted long before DNA testing became forensically available.[157] Thus, defense attorneys have argued that a new standard, one that is analogous to the harmless error doctrine, should apply in cases in which the exculpatory results of DNA testing prove that the trial jury was presented with false conclusions about material trial evidence.[158] Under this doctrine, the party who benefited from the error—which in these cases would be the State—bears the burden of proving that the error did not contribute to the guilty verdict.[159]

3. Newly Discovered Evidence or Harmless Error: Which Test Applies? Policy Arguments on Both Sides

Because the petitioner bears the burden of proof under the newly discovered evidence test, it is conceptually more difficult for a petitioner to succeed in obtaining a new trial under this test than under the harmless error test.[160] To be sure, there are many policy reasons that support subjecting petitioners to a stricter test for challenging their convictions. States have a strong interest in ensuring the finality of judgments, which the U.S. Supreme Court has recognized as essential to both the retributive and deterrent functions of criminal law and to the interests of victims in obtaining closure.[161] Moreover, the "'erosion of memory' and 'dispersion of witnesses' that occur with the passage of time" diminish the chances of a

155. *See id.* at **22. Prosecutors may challenge this argument on the grounds that courts have held that it is the results of the DNA testing to be performed on physical evidence, rather than the physical evidence itself, which should be considered "newly discovered" for purposes of the newly discovered evidence test. *See, e.g.*, People v. Wise, 752 N.Y.S.2d 837, 847 (Sup. Ct. N.Y. County 2002) (holding that the results of DNA testing performed on semen discovered on a victim's body and on clothing found near a crime scene "is certainly newly discovered in the traditional sense since it was not available at trial and could not have been discovered with due diligence"); People v. Tookes, 639 N.Y.S.2d 913, 915 (Sup. Ct. N.Y. County 1996) (defining "DNA test results as potential 'newly discovered evidence' which may form the basis for a motion to vacate judgment").

156. *See, e.g.*, Fed. R. Crim. P. 33(b)(1) ("Any motion for a new trial grounded on newly discovered evidence must be filed within [three] years after the verdict or finding of guilty.")

157. *See Developments in the Law: Confronting the New Challenges of Scientific Evidence*, 108 Harv. L. Rev. 1481, 1577 (1995) [hereinafter *Confronting the Challenges*].

158. *See* Petition for Review, *supra* note 65, at 12 (citing *Strickland v. Washington*, 466 U.S 668, 694 (1984), in which the Supreme Court found constitutional error where "[t]he result of the proceeding can be rendered unreliable, and hence the proceeding itself unfair").

159. *Armstrong*, 2004 Wisc. App. LEXIS 453, at **21. For an argument as to why courts should adopt a test analogous to the harmless error doctrine in these cases, see *infra* part III.A.2.

160. *See, e.g.*, *Armstrong*, 2004 Wisc. App. LEXIS 453, at **22.

161. *See* Kreimer & Rudovsky, *supra* note 25, at 606 n.245.

reliable criminal adjudication if a retrial is granted.[162] Further, traditional forms of newly discovered evidence "may suggest innocence but may not be definitive; this possibility, combined with evidence deterioration problems, may be thought to weaken the appeal to 'innocence' enough that it does not merit disturbing the original judgment."[163] Such strictness may also serve to put moral pressure on those who know of yet-undiscovered evidence to come forward without delay.[164] Finally, strict rules create strong incentives for defendants to perform a thorough investigation while evidence is fresh and to introduce it as soon as practicable, rather than to hold it back to get a new trial.[165]

The usual concerns that arise in traditional post-conviction proceedings, however, are lacking in the context of exculpatory DNA test results.[166] Specifically, "[w]here DNA demonstrates innocence, a central reason for respecting finality of criminal judgments—that retrying a case years later will yield no objectively sounder result than the initial trial—is not implicated."[167] Moreover, as contrasted with the potentially stale testimony of witnesses who change their story or come forward years after trial, exculpatory DNA test results invariably provide more accurate and reliable fact-finding with respect to critical biological evidence[168] and not simply grounds upon which to doubt the validity of the conviction.[169] Thus, the arguments for a stricter test are less compelling in the context of exculpatory post-conviction DNA test results.[170]

At least one court has struggled with the question of which test to apply in DNA-based post-conviction proceedings.[171] In *State v. Armstrong*,[172] the court noted that there was a rational distinction between newly discovered evidence not presented to the jury and evidence later shown to be false, and that "[a]dditional evidence is conceptually different from evidence from which the State argued false conclusions."[173] The court also observed that, if they applied the harmless error test, it would probably result in reversal of the trial court's denial of the petitioner's motion for a

162. Kuhlmann v. Wilson, 477 U.S. 436, 453 (1986) (plurality opinion); *see also* Herrera v. Collins, 506 U.S. 390, 403 (1993) (observing that "the passage of time only diminishes the reliability of criminal adjudications"); McCleskey v. Zant, 499 U.S. 467, 491 (1991) (finding that "when a habeas petitioner succeeds in obtaining a new trial, the erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a reliable criminal adjudication" (internal quotations omitted)).

163. *Confronting the Challenges*, *supra* note 157, at 1577.

164. *Id.*

165. *Id.*

166. *See id.* at 1577-78.

167. Kreimer & Rudovsky, *supra* note 25, at 596.

168. *See Protecting the Innocent*, *supra* note 29, at 226 (testimony of Barry Scheck, Codirector, The Innocence Project).

169. *Double Helix*, *supra* note 25, at 609.

170. *See Protecting the Innocent*, *supra* note 29, at 226.

171. *See* State v. Armstrong, Nos. 01-2789 & 02-2979, 2004 Wisc. App. LEXIS 453, at **22 (Wis. Ct. App. May 27, 2004), *rev'd on other grounds*, 2005 WI 119, 700 N.W.2d 98.

172. *Id.*

173. *Id.*

new trial.[174] Further, the court stated that it is "anomalous that [a court] use[s] a more strict test where the State benefits from false factual conclusions than where the State benefits from an erroneous evidentiary ruling."[175] The court nevertheless felt that it was "not free to develop a different test," because the test for newly discovered evidence was the test that both the highest state court and that court used.[176] Applying the newly discovered evidence test, the court found that the petitioner failed to show that the admission of exculpatory DNA test results created a reasonable probability that the outcome would be different in a new trial.[177]

D. *Judicial Estoppel*

In addition to disputing who bears the burden of proof in DNA-based post-conviction proceedings, defense attorneys have argued that courts should judicially estop prosecutors from asserting arguments in opposition to a petitioner's post-conviction claim of innocence which are inconsistent with the theory of the case that the State presented at trial.[178] Although a handful of jurisdictions theoretically allow judicial estoppel to be applied against the government in criminal cases,[179] there is no case in which the doctrine has been successfully invoked against a state.[180] Thus, although a

174. *Id.* at **21-22.

175. *Id.* at **22.

176. *Id.* at **22-23 (citing State v. Avery, 570 N.W.2d 573 (Wis. Ct. App. 1997)). Ironically, the court's application of the newly discovered evidence test in *Avery* led to that petitioner's continued wrongful incarceration for six additional years before he was exonerated by further DNA testing. Petition for Review, *supra* note 65, at 4.

177. *Armstrong*, 2004 Wisc. App. LEXIS 453, at **29. The Supreme Court of Wisconsin reversed the decision of the circuit court in the interest of justice and remanded the case with instructions for the lower court to vacate Armstrong's conviction and order a new trial. State v. Armstrong, 2005 WI 119, ¶ 2, 700 N.W.2d 98, ¶ 2. The court reversed on the grounds that post-conviction DNA testing on biological evidence linked to Armstrong at trial, which the test results showed did not originate from Armstrong, indicated that the real controversy at trial-the identification of the perpetrator-was not fully tried. *Id.* Because the court decided this case as it did, it did not explicitly address whether the newly discovered evidence test or the harmless error test was the appropriate standard under which courts should analyze DNA based post-conviction motions. The court did, however, in dicta, "clarify the proper test for analyzing newly discovered evidence," indicating that the newly discovered evidence test remains the standard under which DNA-based claims of innocence are analyzed in Wisconsin. *Id.* at ¶ 157.

178. *Armstrong*, 2004 Wisc. App. LEXIS 453, at **18-19.

179. *See, e.g.*, State v. Towery, 920 P.2d 290 (Ariz. 1996).

180. *See, e.g.*, Smith v. State, 765 N.E.2d 578, 582 (Ind. 2002) (noting that "judicial estoppel in this state has been applied only in civil cases, and neither this Court nor the Court of Appeals has applied the doctrine against the State in a criminal case"). Federal courts have been even less receptive to the application of judicial estoppel against the government in criminal proceedings. For example, in *United States v. Garcia*, the court found no precedent for the use of judicial estoppel in the criminal context, noting that "[g]iven the unique status of the government as a litigant . . . and the great degree of latitude that the government enjoys in prosecuting the law and striking plea bargains . . . we are simply not persuaded that this is a case in which to plow such novel legal ground." No. 99-10262, 2000 U.S. App. LEXIS 4178, at *4 (9th Cir. Mar. 14, 2000) (citations omitted); *see also* Nichols v. Scott, 69 F.3d 1255, 1272 (5th Cir. 1995) (stating that judicial estoppel is not

few criminal cases have noted that the doctrine of judicial estoppel could preclude the State from asserting a particular contention, in each case at least one of the elements of judicial estoppel was not satisfied.[181] The next sections discuss the three conditions that must be satisfied in order for a court to apply judicial estoppel against a party to a criminal proceeding, (1) The parties must be the same in both proceedings, (2) the facts or question at issue must be the same in both proceedings, and (3) the party asserting the inconsistent position must have been successful in a prior judicial proceeding.[182]

1. The Parties Must Be the Same

Courts have held that, in civil cases, the party seeking the protection of judicial estoppel need not have been a party to the prior proceeding in which the alleged contradictory statement was made.[183] Citing these decisions, defendants in criminal cases have requested that courts apply judicial estoppel against the State to prevent prosecutors from attempting to convict two defendants of the same crime in separate trials, where only one can be truly guilty of the offense.[184] Moreover, much of the scholarship regarding the application of judicial estoppel in the criminal context addresses the use of the doctrine to bar prosecutors from prosecuting two defendants for the same crime in separate trials.[185] Nevertheless, courts in criminal cases have consistently rejected requests to apply judicial estoppel against the State where the parties to the separate criminal proceedings in

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constitutionally mandated and has never been applied against the government in a criminal proceeding); United States v. Kattar, 840 F.2d 118, 129 n.7 (1st Cir. 1988) (stating that judicial estoppel is an "obscure doctrine [that] has never been applied against the government in a criminal proceeding"). Furthermore, the Supreme Court has held that the Government may not be estopped on the same terms as any other litigant, because "[w]hen the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined." Heckler v. Cmty. Health Servs. of Crawford County, Inc., 467 U.S. 51, 60 (1984). As such, the Supreme Court has "reversed every finding of estoppel [against the government] that we have reviewed." Office of Pers. Mgmt. v. Richmond, 496 U.S. 414, 422 (1990). The Court has, however, left "for another day whether an estoppel claim could ever succeed against the Government." *Id.* at 423.

181. *Smith*, 765 N.E.2d at 582-83 (citing Brightman v. State, 758 N.E.2d 41, 47-48 (Ind. 2001)); Redington v. State, 678 N.E.2d 114, 117 n.5 (Ind. Ct. App. 1997).

182. *See Towery*, 920 P.2d at 290.

183. *See, e.g.*, Bellinger v. Boatmen's Nat'l Bank of St. Louis, 779 S.W.2d 647, 650 (Mo. Ct. App. 1989); Travelers Prop. Cas. Corp. v. Jim Walter Homes, Inc., 1998 OK CIV APP 80, ¶ 3, 966 P.2d 1190, 1191; Aetna Life Ins. Co. v. Wells, 557 S.W.2d 144, 147 (Tex. Civ. App. 1977).

184. *See* Poulin, *supra* note 25, at 1424 (providing the example of a prosecutor arguing in two separate murder trials that two defendants each fired the single bullet that killed the victim and obtaining convictions and death sentences for both defendants).

185. *Id.*; *see also* Michael Q. English, Note, *A Prosecutor's Use of Inconsistent Factual Theories of a Crime in Successive Trials: Zealous Advocacy or a Due Process Violation?*, 68 Fordham L. Rev. 525, 547 (1999).

question are not identical.[186] In so holding, courts have reasoned that if, after one defendant is convicted of a crime, additional evidence becomes available suggesting the guilt of a second person on an inconsistent theory, some type of relief may be afforded to the first defendant.[187] The immunization of the second defendant due to a mistake in the prosecution of the first, however, is not the appropriate remedy.[188]

These same courts, however, have also left "for another day the issue of whether judicial estoppel can be applied against the State in a criminal case if the parties in the prior suit are the same, i.e., in a subsequent prosecution of the same defendant."[189] This language leaves open the possibility that this requirement for applying the doctrine of judicial estoppel would be satisfied in cases where convicted offenders presenting exculpatory DNA test results in support of their claims of innocence request that courts estop prosecutors from making arguments inconsistent with the theory of the crime advanced at trial.[190]

2. The Question or Facts Involved Must Be the Same

In addition to the requirement that the parties in both criminal proceedings be identical for judicial estoppel to apply, courts also require that the facts or question involved be the same in both proceedings.[191] This requirement serves the specific goal of protecting the judicial system from being manipulated by "chameleonic litigants" who attempt to prevail twice on the same set of facts, but on opposite theories.[192] Thus, for example, courts have found this requirement met where a plaintiff who had been granted disability benefits on the grounds that he was totally disabled then attempted to recover against his employer under the Americans with Disabilities Act on the grounds that he was terminated despite being a

186. *See, e.g.*, *Smith*, 765 N.E.2d at 583 (holding that judicial estoppel based on an inconsistent position in an earlier criminal case against a different defendant did not apply against the State).

187. *Id.* at 584.

188. *Id.*

189. *Id.*

190. See *infra* Part III.B.1 for an explanation of why this prong is satisfied in the cases at issue in this Note.

191. *See* State v. Towery, 920 P.2d 290, 304 (Ariz. 1996); State v. Armstrong, Nos. 01-2789 & 02-2979, 2004 Wisc. App. LEXIS 453, at **18-19 (Wis. Ct. App. May 27, 2004), *rev'd on other grounds*, 2005 WI 119, 700 N.W.2d 98. The doctrine of judicial estoppel applies only to prevent the presentation of inconsistent factual positions; expressions of opinion and assertions of legal conclusions do not trigger application of the doctrine. Boyers, *supra* note 85, at 1262; *see also* People v. Caballero, 794 N.E.2d 251, 263 (Ill. 2002). Expressions of opinions are not estopped because they "reflect the speaker's then-current state of mind and are inherently variable." Boyers, *supra* note 85, at 1262. Assertions of legal conclusions do not trigger the application of the doctrine because "historically, switching one's legal grounds in a suit has never been regarded with the same disfavor as maintaining inconsistent positions as to the facts." *Id.* (quoting Note, *The Doctrine of Preclusion Against Inconsistent Positions in Judicial Proceedings*, 59 Harv. L. Rev. 1132, 1133 (1946)).

192. *See* Levinson v. United States, 969 F.2d 260, 264 (7th Cir. 1992).

qualified person with a disability who could perform the essential functions of his job.[193]

This requirement is typically not disputed in criminal cases. For example, in *State v. Towery*,[194] a convicted offender requested that the court apply the doctrine to prevent the State from presenting evidence that the defendant had confessed to his roommate that he committed a murder, because the State had previously used the same evidence to convict the defendant of an unrelated armed robbery.[195] The court found that the question from both trials was the same; namely, whether the defendant had confessed to his roommate that he committed the crime at issue, or another, unrelated crime.[196]

The decision of one court in declining to invoke the doctrine because this requirement was not met, however, calls into question whether the doctrine of judicial estoppel can ever apply against the State in cases where the convicted offender seeks to introduce exculpatory results of post-conviction DNA testing. In *State v. Armstrong*,[197] a convicted murderer requested that the court invoke judicial estoppel to prevent the State from making arguments that were inconsistent with that which the State argued at trial.[198] Specifically, the State argued at trial that two hairs found on the victim's bathrobe belt, which the murderer left draped on top of the victim's naked body, originated from the perpetrator and specifically implicated Armstrong.[199] When the results of post-conviction DNA testing excluded Armstrong as the source of the hairs,[200] however, the State reversed course and argued that the biological evidence from the crime scene was not connected to the murder and that "innocuous reasons explain why that physical evidence was present."[201]

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193. *See, e.g.*, McNemar v. Disney Store, Inc., 91 F.3d 610, 617-18 (3d Cir. 1996).

194. 920 P.2d at 290.

195. *Id.* at 304-05.

196. *Id.* In *Towery*, both the first and the second requirements for the application of judicial estoppel were met; however, the court declined to invoke judicial estoppel in this case because the third requirement for the application of judicial estoppel was not satisfied. *Id.* at 305-06. See *infra* notes 256-58 and accompanying text for the court's reasons as to why the third requirement was not met in *Towery*.

197. Nos. 01-2789 & 02-2979, 2004 Wisc. App. LEXIS 453 (Wis. Ct. App. May 27, 2004), *rev'd on other grounds*, 2005 WI 119, 700 N.W.2d 98.

198. *Id.* at **18-19.

199. *Id.* at **18; *see also* Petition for Review, *supra* note 65, at 6. At trial, a microscopic hair analyst testified that one of the two hairs was consistent and that the other was similar to Armstrong's hair. *Armstrong*, 2004 Wisc. App. LEXIS 453 at **13. Moreover, the prosecutor emphasized this hair evidence in closing arguments to the jury, stating that "[t]he physical evidence . . . ties [Armstrong] *irrevocably* to the murder of" the victim. *See* Petition for Review, *supra* note 65, at 7 (quoting Transcript of Record at 131, State v. Armstrong, 2005 WI 119, 700 N.W.2d 98 (Nos. 01-2789 & 02-2979)).

200. Furthermore, the DNA test results demonstrated that the hairs on the bathrobe belt came from the same person, and this person was neither the victim, nor Armstrong, nor the victim's boyfriend. Petition for Review, *supra* note 65, at 7.

201. *Armstrong*, 2004 Wisc. App. LEXIS 453 at **18.

Without reaching the question of whether the State was advancing a truly inconsistent position from trial,[202] the court held that judicial estoppel did not lie because Armstrong sought to present newly discovered evidence—namely, the exculpatory DNA test results—and thus the facts were not the same in both proceedings.[203] On appeal of this decision, however, Armstrong contended that the facts in both proceedings were indeed the same—"that hair belonging to someone other than the victim was found on the bloodied bathrobe belt laying on top of her dead body"[204]—and that it is only the conclusion that the State was drawing from those facts that was different.[205]

3. The Party Asserting the Inconsistent Position Must Have Been Successful in the Prior Judicial Proceeding

Even if the parties and the facts or questions involved are the same in both proceedings, courts will refuse to apply judicial estoppel unless the party asserting the inconsistent position was successful in the prior judicial proceeding.[206] This condition requires two elements be met: First, the party to be estopped must be advancing an inconsistent position;[207] and second, the party to be estopped must have been successful in the first proceeding as a result of the position taken therein, which the party is now contradicting in the subsequent proceeding.[208]

a. *Inconsistent Positions*

Courts justify invoking the doctrine of judicial estoppel on the theory that "[a] party who has gained an advantage by characterizing the law or facts involved in a case should not later be able to contradict that characterization in order to obtain a further advantage."[209] Thus, "[a] party can argue

202. See *infra* Part II.B.3.a for a review of the different approaches courts take in determining whether an argument asserted by the State in post-conviction proceedings is inconsistent with the theory of the crime presented by the State at trial.

203. *Armstrong*, 2004 Wisc. App. LEXIS 453 at **19. For an argument as to why this prong of the test is satisfied in cases involving exculpatory post-conviction DNA test results, see *infra* Part III.B.1.

204. Petition for Review, *supra* note 65, at 28.

205. *Id.* The Supreme Court of Wisconsin reversed the court's decision and remanded the case for a new trial, but on different grounds. State v. Armstrong, 2005 WI 119, 700 N.W.2d 98. Specifically, the Court held that results of the post-conviction DNA testing which excluded Armstrong as the source of biological evidence previously linked to him at trial rendered the controversy of identification of the perpetrator not fully tried. *Id.* at ¶ 2; *see also supra* note 177. The Supreme Court did not discuss whether the application of judicial estoppel was appropriate in this case, leaving the resolution of this issue—at least in Wisconsin—for another day. *Armstrong*, 2005 WI 119, ¶ 109, 700 N.W.2d 98, ¶ 109.

206. State v. Towery, 920 P.2d 290, 304-05 (Ariz. 1996).

207. *See* Boyers, *supra* note 85, at 1263-64.

208. *Towery*, 920 P.2d at 305.

209. United States v. Kepner, 843 F.2d 755, 760 (3d Cir. 1988).

inconsistent positions in the alternative,[210] but once it has sold one to the court it cannot turn around and repudiate it in order to have a second victory."[211] For example, a court once invoked judicial estoppel to bar a criminal defendant who requested a lesser-included charge of manslaughter at trial from arguing on appeal that the evidence was insufficient to support his conviction on that charge.[212]

Courts apply the doctrine of judicial estoppel only when the positions taken by a party in separate proceedings are truly inconsistent;[213] that is, when "'the truth of one . . . necessarily preclude[s] the truth of [the] other.'"[214] For example, in *People v. Gayfield*[215] the court held that prosecutors did not take inconsistent positions in two proceedings where, in the first proceeding, a defendant pleaded guilty to murder and identified one man as the shooter and, in the second proceeding, the state prosecuted the petitioner with the murder and identified him as the shooter.[216] Without discussing whether judicial estoppel should apply in a criminal proceeding, the court rejected applying the doctrine on the facts of the case, concluding that "there was no certain position taken at one proceeding that was contrary to another proceeding."[217]

In one of the few cases where a court invoked judicial estoppel against the Government, the U.S. Court of Appeals for the Ninth Circuit in *Russell*

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210. *See, e.g.*, Fed. R. Civ. P. 8(e)(2) ("A party may set forth two or more statements of a claim or defense alternately . . . . A party may also state as many separate claims or defenses as the party has regardless of consistency . . . ."). Scholars have suggested that issues of inconsistency that arise within a single trial do not threaten the basic fairness of the process because when the prosecution offers the jury alternate bases upon which the jury could resolve the case, the jury can evaluate and weigh inconsistent alternatives in the context of the entire case. Poulin, *supra* note 25, at 1429-30. This is true even if the prosecution argues truly irreconcilable positions, such as arguing in a single trial that each of two defendants fired the single fatal bullet, because the jury can evaluate them as alternatives with the knowledge that both cannot be true. *Id.* at 1429.

211. Cont'l Ill. Corp. v. Comm'r, 998 F.2d 513, 518 (7th Cir. 1993).

212. State v. Michels, 414 N.W.2d 311, 317 (Wis. Ct. App. 1987).

213. State v. Petty, 548 N.W.2d 817, 821 n.5 (Wis. 1996).

214. Boyers, *supra* note 85, at 1263 (quoting Dept. of Transp. v. Coe, 445 N.E.2d 506, 508-10 (Ill. App. Ct. 1983)).

215. 633 N.E.2d 919 (Ill. App. Ct. 1994).

216. *Id.* at 924-25. The specific facts of this case are as follows: Latero Jones pled guilty to the 1988 murder of Eric Rodgers. *Id.* at 923. At a dispositional hearing for the guilty plea, it was stipulated on the record between the State and Jones that Richard Cooks was the murderer, and Jones was pleading guilty because he had assisted Cooks in murdering Rodgers by identifying Rodgers to Cooks. *Id.* at 923-24. The State subsequently prosecuted Gayfield for this murder. *Id.* at 924. Gayfield contended the State should be estopped from prosecuting him for this murder because at Jones's dispositional hearing the State advanced the theory that another person was the perpetrator. *Id.* at 923. The court rejected Gayfield's estoppel argument, finding that the State's theory in Jones's dispositional hearing was that Jones was accountable for the murder, not that Cooks was the perpetrator. *Id.* at 924-25.

217. *Id.* at 925. The court noted that "[t]he only relevancy of naming Cooks is that it supported Jones' confession that he acted in concert with another in accomplishing the murder. To be certain, Jones could have named anyone as the shooter." *Id.* at 924; *accord* Commonwealth v. Lam, 684 A.2d 153, 164 (Pa. Super. Ct. 1996).

v. Rolfs[218] estopped the State from advancing contradictory and "flatly inconsistent" positions in successive post-conviction proceedings.[219] During a federal habeas corpus proceeding, the prosecution argued to the district court that the petitioner had failed to exhaust all available state remedies; thus, federal review of his conviction was improper because the petitioner had an adequate and available remedy in state court through the Personal Restraint Petition procedure.[220] The petitioner subsequently filed for relief in state court, before which the prosecution "disregarded its previous representation in federal court" and instead argued that the petitioner's petition "should be dismissed because this petition [sic] raises the same legal basis for granting relief as did his appeal, the issues were decided on the merits against [the petitioner], and now considering these same issues in his personal restraint petition would not serve the ends of justice."[221] The court estopped the prosecution from making these contradictory arguments, holding that "[h]aving persuaded the district court to deny appellant federal review on the ground that he had an 'adequate and available' state remedy, the state cannot now be permitted to oppose appellant's petition for relief on the theory he was actually procedurally barred in state court."[222]

In the DNA context, prosecutors assert that they are not advancing irreconcilably inconsistent positions when they argue that the biological evidence, previously linked to the defendant, is irrelevant to the convicted offender's guilt.[223] Prosecutors also argue that they are not advancing an inconsistent position from trial when they argue a new theory of the crime, because the State's theory of the case at trial was and always has been that the person convicted of the crime was the perpetrator.[224] Petitioners, however, can look to the decision of one court for support that courts should reject arguments made by prosecutors to explain how someone is guilty of a crime despite the fact that the results of post-conviction DNA testing demonstrate that the petitioner is not the source of the biological evidence left by the perpetrator and linked at trial to the petitioner.[225]

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218. 893 F.2d 1033 (9th Cir. 1990).
219. *Id.* at 1037-39.
220. *Id.* at 1037.
221. *Id.*
222. *Id.* at 1038.
223. *See, e.g.*, State v. Armstrong, Nos. 01-2789 & 02-2979, 2004 Wisc. App. LEXIS 453, at **18 (Wis. Ct. App. May 27, 2004), *rev'd on other grounds*, 2005 WI 119, 700 N.W.2d 98.
224. *See, e.g.*, Watkins v. Miller, 92 F. Supp. 2d 824, 840 n.9 (S.D. Ind. 2000) (discussing the State's contention that its theory of the case at trial espoused no particular view concerning whether Watkins acted alone, or in concert with someone else, simply that he was involved with her death); *Armstrong*, 2004 Wisc. App. LEXIS 453 at **18 (discussing the State's argument that judicial estoppel could not be invoked against the State because it had not asserted irreconcilably inconsistent positions, in that it has consistently taken the position that Armstrong sexually assaulted and murdered the victim).
225. *See Watkins*, 92 F. Supp. 2d at 824.

Jerry Watkins, who was convicted in 1986 of the rape and murder of his eleven-year-old sister-in-law,[226] moved for habeas corpus relief in federal district court on the basis of post-conviction DNA test results which showed that he was not the source of the semen found in the victim.[227] In opposition to Watkins's motion for habeas relief, the State theorized that Watkins and another person raped the victim,[228] even though at trial the State never suggested that anyone other than Watkins raped and murdered the victim.[229] The district court rejected this argument, because it was not only "farfetched" from a scientific standpoint, as it depended on "the improbable assumption that semen from two different men just happened to be collected on the same vaginal swab in exactly equal amounts,"[230] but also "utterly inconsistent" with the theory of the case the prosecution presented to the jury.[231]

In the alternative, the State argued that, because Watkins was convicted of murder rather than rape, evidence that he is innocent of rape would not show he is actually innocent of murder.[232] As the court pointed out, however, at trial the prosecution never suggested nor hinted at the possibility that one person raped the victim and another murdered her.[233] Indeed, at trial the State contended that one person—Watkins—committed both crimes.[234] Furthermore, the State used evidence linking the rape to the murder to persuade the trial court to admit damaging evidence against Watkins.[235] The court rejected this new theory as well, finding that, "[b]y

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226. *Id.* at 827.

227. *See id.* at 827, 836.

228. *Id.* at 836.

229. *Id.* at 838.

230. *Id.* at 828. The forensic scientist who performed the DNA testing testified that because the DQ Alpha test results on the sperm from the victim's vaginal swab were 1.1/4, he could not completely exclude the possibility that Watkins was a source because his DQ Alpha genotype is 4/4, and some of the material on the vaginal swab tested as 4. *Id.* at 836-37. The forensic scientist explained that the 1.1 portion and the 4 portion of the male material on the swab were of equal intensity, and that one theoretical explanation for this DQ Alpha test result is that the male portion of the swab material could have come from a man like Watkins with 4/4 DQ Alpha, which was mixed with an equal amount of material from another man with 1.1/1.1 DQ Alpha. *Id.* at 836. However, the forensic scientist testified that this possibility of an equal mixture of 1.1/1.1 and 4/4 from two men was "farfetched" from a scientific standpoint. *Id.* at 837. To get such a result from two men, they each would have to have deposited semen that mixed in such a way that the swab collected equal amounts of sperm from each. *Id.* at 836-37. Thus, the forensic scientist testified, the "most reasonable" and "more logical easiest interpretation" of the 1.1/4 results is that the sperm came from one man with the 1.1/4 genotype—a DQ Alpha profile that did not match Watkins. *Id.* at 836.

231. *Id.* at 828. As the district court pointed out, at no point during Watkins's trial did the State suggest that the victim was raped and murdered by anyone other than Watkins. *See id.* at 838.

232. *Id.*

233. *Id.* at 839.

234. *Id.*

235. *Id.* The trial court admitted evidence that Watkins had molested both the victim and her older sister prior to the victim's rape and murder to support the State's theory that Watkins showed a "depraved sexual instinct." *Id.* That evidence was admitted as relevant only because, according to the State, there was also evidence that the victim had been raped

arguing to this court that the murder and the rape were not necessarily linked, the state has [again] abandoned the foundation of both the case it persuaded the trial judge to allow and the case it persuaded the jury to credit beyond a reasonable doubt."[236] The court granted Watkins's writ of habeas corpus and vacated his conviction partly[237] because "[t]he state's theory that Watkins alone raped [the victim] and then killed her—the only theory argued to the jury—is excluded by the DNA evidence beyond any reasonable doubt."[238] The court also noted that "no one should be sentenced to 60 days in prison, let alone 60 years, on the theory and evidence the state relies upon in this case to keep Jerry Watkins in prison."[239]

The court's rejection of the State's inconsistent arguments in *Watkins* did not manifest as an application of judicial estoppel against the State. Nevertheless, the logic of the court's decision could be used by petitioners facing the same type of arguments in their DNA-based post-conviction proceedings to support their contention that the State is advancing a position truly inconsistent with that which it advanced at trial.

b. *Success in a Prior Proceeding*

Courts require success in a prior judicial proceeding in order to apply judicial estoppel because, absent judicial acceptance of the prior position, there is no risk of inconsistent results.[240] The "success" test narrows the scope of judicial estoppel, allowing courts to protect themselves from specific threats to their integrity while simultaneously ensuring that the doctrine is not overused to the detriment of litigants.[241]

Some courts have held that a prior position was successfully maintained only if the party gained judicial relief as a result of asserting the particular position in the first proceeding.[242] However, most courts that have

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by Watkins. *See* Watkins v. State, 528 N.E.2d 456, 458 (Ind. 1988) (upholding on direct appeal the admission of evidence at trial that the defendant had previously molested the victim's older sister to support the State's theory that the defendant had a "depraved sexual instinct").

236. *Watkins*, 92 F. Supp. 2d at 839.

237. The court also granted the writ of habeas corpus because the State had withheld potentially exculpatory, non-DNA evidence from Watkins at the time of trial, which is a constitutional violation under *Brady v. Maryland*, 373 U.S. 83 (1963). *Watkins*, 92 F. Supp. 2d at 856-57.

238. *Watkins*, 92 F. Supp. 2d at 839.

239. *Id.* at 840.

240. State v. Towery, 920 P.2d 290, 305 (Ariz. 1996).

241. Deeks, *supra* note 81, at 877; *see also* Boyers, *supra* note 85, at 1263 (stating that "the court, keeping in mind the 'unnecessary hardship' that may result from invoking judicial estoppel when the position was unimportant in the initial proceeding, determines whether the importance of the issue in the particular case justifies invocation of the doctrine").

242. *See Towery*, 920 P.2d at 305 (citing Standage Ventures, Inc. v. State, 562 P.2d 360 (Ariz. 1977); State Farm Auto. Ins. Co. v. Civil Serv. Employees Ins. Co., 509 P.2d 725, 731

considered this issue have held that the prior court's acceptance of the position now contradicted is sufficient to constitute prior success.[243] For example, consider the following: An employee files a claim under a state worker's compensation statute, and his assertion at the hearing of ten percent disability is stipulated for the record.[244] Although the employee is ultimately denied compensation on the grounds that the injury did not arise "out of and in the course of employment" as required by the relevant statute, there was nevertheless judicial acceptance of his claim to a ten percent disability as evidenced by the stipulation on the record.[245] Suppose further that the employee subsequently sues his employer under tort law and claims thirty percent disability.[246] Under the prior success rule, the employee would be estopped from claiming thirty percent disability, because his previous assertion of a ten percent disability was accepted in the prior judicial proceeding.[247]

In the criminal context, however, it is difficult—if not impossible—to determine whether a prior court accepted the State's particular assertion, which prosecutors later contradict in the face of exculpatory DNA test results, because juries rarely, if ever, articulate the basis for their verdicts.[248] Thus, it has been established that, in determining whether the prior success test for the application of judicial estoppel is met, courts in criminal cases must examine the record of the trial to determine whether the assertion at issue was arguably significant to the jury's determination of the defendant's guilt.[249] In other words, the relevant inquiry in criminal cases is whether the court concludes that the judicial relief obtained by the State in the form of a conviction was arguably due, at least in part, to the assertion that the prosecution is now contradicting.[250] Furthermore, because it is difficult, or even impossible, to ascertain the basis for the jury's verdict, it has been suggested that "[t]he prosecution [may] be able to avoid the impact of the doctrine only by demonstrating that the inconsistent theory was specifically rejected by the court or the jury in the first trial."[251]

(Ariz. Ct. App. 1973); Taylor v. State Farm Mut. Auto. Ins. Co., 893 P.2d 39, 44 (Ariz. Ct. App. 1995)).

243. *See* Konstantinidis v. Chen, 626 F.2d 933, 936 n.6 (D.C. Cir. 1980) (noting that judicial estoppel does not require a prior litigation of the issue in question, "merely a prior judicial acceptance of the factual assertion made by the party who now advances an inconsistent contention"); *Towery*, 920 P.2d at 305 (citing Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 598 (6th Cir. 1982)); *see also* Boyers, *supra* note 85, at 1256.

244. *See* Boyers, *supra* note 85, at 1256-57.

245. *Id.* at 1257.

246. *Id.*

247. *Id.*

248. Poulin, *supra* note 25, at 1454; *see also, e.g.*, United States v. Quintero, 165 F.3d 831, 836 (11th Cir. 1999) (finding that inconsistency of verdicts does not provide information about a jury's reasoning); United States v. Vaughn, 80 F.3d 549, 551 (D.C. Cir. 1996) (listing possible bases for a jury verdict), *cited in* Poulin, *supra* note 25, 1444 n.122.

249. State v. Towery, 920 P.2d 290, 305 (Ariz. 1996).

250. *See id.*

251. Poulin, *supra* note 25, at 1455.

Thus, judicial estoppel is generally not applied when the trial record indicates that the first inconsistent position was not a significant factor in the initial proceeding.[252] For example, in *State v. Towery*,[253] the defendant requested that the court estop the prosecutor from allowing the defendant's roommate to testify that the defendant confessed to murder, when the State had previously used the roommate's testimony describing the same confession to convict the defendant of an unrelated armed robbery.[254] The defendant argued that by presenting evidence of a single incident at two separate trials to prove two separate, unrelated crimes, the prosecutor was making inconsistent use of the same evidence, an action which warranted the application of judicial estoppel.[255]

Despite the State's concession that the roommate heard only one admission about one crime, while using the same admission in two trials to prove two unrelated criminal acts, the Arizona Supreme Court nevertheless held that judicial estoppel did not apply.[256] The court held this because a review of the trial record indicated that the roommate's testimony at the robbery trial constituted an insignificant factor in obtaining a conviction in that trial.[257] Thus, the State's prior position that the defendant confessed to his roommate that he had committed a robbery had not been successfully maintained.[258] Similarly, prosecutors faced with exculpatory post-conviction DNA test results argue that biological evidence linked to the convicted offender at trial was insignificant to the verdict, in light of other evidence of guilt.[259]

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252. Boyers, *supra* note 85, at 1263.

253. 920 P.2d at 290.

254. *Id.* at 304-06.

255. *Id.* at 303-04.

256. *Id.* at 306.

257. *Id.* The court cited numerous other pieces of evidence from the trial record that indicated that the roommate's testimony was insignificant to the finding of guilt in the armed robbery trial, including: (1) There had been identification of the defendant in a photographic line-up and at trial by all of the robbery victims; (2) when the defendant was arrested for the armed robbery, he had four credit cards of one of the victims in his wallet; (3) the police found a gun in the defendant's home identified by one of the victims as the gun used in the robbery, as well as clothing similar to that worn by the perpetrator of the robbery; (4) the defendant had a police scanner on his person when arrested, and the robbery victims had noted that the robber had an identical police scanner with him at the time of the crime; and (5) the license plate of the car the defendant drove to the robbery matched that of another roommate's car, and the roommate testified that the defendant had access to that car. *Id.* Regarding the admission specifically, the court noted that the roommate's testimony about the defendant's admission consisted of an unresponsive answer to a single question, was never mentioned again in the examination of the roommate or any other witness, and was never referred to in the State's opening statement or closing argument. *Id.* Furthermore, the court held that a guilty verdict did not establish per se that the State's prior position regarding the confession had been successfully maintained; it established only that the jury accepted the State's position that petitioner committed the crime for which he was charged. *Id.* at 305.

258. *Id.* at 306.

259. *See* State v. Armstrong, 2005 WI 119, ¶ 146, 700 N.W.2d 98, ¶ 146. In *Armstrong*, post-conviction DNA testing excluded the person convicted of a rape and murder as the source of biological evidence linked to him at trial. *Id.* at ¶¶ 92, 96. In opposition to

By contrast, petitioners argue that the presentation at trial of physical evidence as affirmative proof of guilt, later shown through DNA testing to be erroneous, clouded an issue central to the verdict.[260] Some courts agree.[261] For example, the court in *Watkins v. Miller*[262] viewed specific forensic evidence presented by the State at Watkins's murder trial as extremely relevant to the jury's guilty verdict.[263] At the 1986 trial, which occurred before DNA testing was forensically available, the State introduced evidence of blood types from serology testing, which showed that the victim was blood type A and that Watkins was blood type O.[264] The vaginal swabs of semen taken during the autopsy, however, tested positive for blood type B, which would be consistent with blood types B or AB, but was not consistent with the defendant's blood type.[265]

At trial, the State offered evidence to explain how these results were possible, even though Watkins was guilty of the crime.[266] The State's expert witness testified that the evidence of blood type B indicators in the semen was "very spurious" and "erratic,"[267] and thus "we couldn't really eliminate a blood type of any particular type for the semen donor. . . ."[268] The expert also testified that, although the evidence of type B blood could have resulted from a perpetrator having B or AB blood, it could also have resulted from bacterial contamination occurring in the days before the victim's body was discovered.[269] The State argued to the jury that, due to possibility of bacterial contamination, the blood tests could not eliminate any male, including Watkins, as the source of the semen.[270] On the basis of this evidence and the testimony of a jailhouse informant who claimed that Watkins confessed to him, Watkins was convicted.[271] The results of post-conviction DNA testing, however, demonstrated that Watkins was not the

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Armstrong's motion for a new trial on the basis of the exculpatory DNA test results, the State argued that it had "simply use[d] the physical evidence to establish an inference of guilt" at trial. *Id.* at ¶ 139. See also text accompanying *supra* notes 114-22 for other examples of cases in which prosecutors made such arguments and *supra* notes 41-42 for the problems associated with other evidence of guilt, such as eyewitness identifications and confessions.

260. *See Armstrong*, 700 N.W.2d at ¶ 115.

261. *See, e.g., id.* at ¶ 154. (holding that, based on a review of the record, it could "not be said with any degree of certainty that the physical evidence did not influence the jury's verdict").

262. 92 F. Supp. 2d 824 (S.D. Ind. 2000).

263. *See id.* at 838-39.

264. *Id.* at 835.

265. *Id.*

266. *See id.*

267. *Id.* (citing the Transcript of Record at 996, *Watkins*, 92 F. Supp. 2d 824 (No. IP97-0485-C-H/G)).

268. *Id.* (citing the Transcript of Record at 997-98, *Watkins*, 92 F. Supp. 2d 824 (No. IP97-0485-C-H/G)).

269. *Id.* (citing the Transcript of Record at 996-97, *Watkins*, 92 F. Supp. 2d 824 (No. IP97-0485-C-H/G)).

270. *Id.* (citing the Transcript of Record at 2227-28, 2234, *Watkins*, 92 F. Supp. 2d 824 (No. IP97-0485-C-H/G)).

271. *See id.*

source of the semen found in the victim's body, and conclusively disproved the "bacterial contamination" theory the State presented at trial.[272] Partially on the basis of these test results, the district court granted Watkins's petition for a writ of habeas corpus.[273]

The court's decision in this case indicates that, had the jury not accepted the state's "bacterial contamination" explanation, the jury also could not have credited the testimony of the jailhouse informant, who claimed that Watkins confessed to the informant that he—and only he—murdered the victim.[274] Nor would the jury have believed the prosecution's assertion that "'[t]here is no evidence whatsoever that anybody else ever molested'" the victim.[275] Thus, the court considered the State's trial theory of "bacterial contamination" of the biological evidence successful in the prior proceeding.[276]

c. *Are Convicted Offenders Who Confessed or Plead Guilty but Claim They Are Innocent Subject to Judicial Estoppel? A Related Issue.*

If courts invoke the doctrine of judicial estoppel to bar prosecutors from making arguments in post-conviction proceedings which are inconsistent with their strategies from trial, the doctrine of judicial estoppel could also be used to bar a convicted offender from requesting post-conviction DNA testing if he or she confessed or pled guilty to committing the crime for which he or she was convicted. DNA-based post-conviction claims of innocence by definition involve a claim that the prisoner is actually innocent,[277] and, at least superficially, confessing or pleading guilty seems inconsistent with a subsequent claim of innocence.[278] Prosecutors may

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272. *Id.* at 837-38.

273. *Id.* at 857.

274. *Id.* at 838.

275. *Id.* (quoting the Transcript of Record at 2177, *Watkins*, 92 F. Supp. 2d 824 (No. IP97-0485-C-H/G)).

276. *See id.* at 839.

277. *See* Goldberg & Siegel, *supra* note 24, at 405.

278. Proponents of this contention may find support for their views in the many state post-conviction DNA testing statutes which either explicitly or implicitly prohibit those who plead guilty from requesting, and thus obtaining, post-conviction DNA testing. *See, e.g.*, Ariz. Rev. Stat. Ann. § 13-4240(C)(1)(a) (2002) (referring to "verdict"); Ark. Code Ann. § 16-112-125(b)(1) (2001) (requiring petitioner to present prima facie proof that, inter alia, "identity was an issue in the trial"); Del. Code Ann. tit. 11, § 4504(a)(3) (2001) (same); Fla. Stat. Ann. § 925.11(1)(a) (West 2001) (referring to "a person who has been tried and found guilty"); Idaho Code Ann. § 19-4902(c)(1) (2002) (requiring petitioner to present prima facie proof that, inter alia, "identity was an issue in the trial"); 725 Ill. Comp. Stat. 5/116-3(b)(1) (2002) (same); La. Code Crim. Proc. Ann. art. 926.1(B)(1) (2002) (referring to evidence "introduced at trial"); Me. Rev. Stat. Ann. tit. 15, § 2138(4)(E) (2001) (requiring petitioner to present prima facie proof that, inter alia, "identity of the person . . . was at issue during the person's trial"); Md. Code Ann., Crim. Proc. § 8-201(c)(4) (West 2001) (same); Mich. Comp. Laws Ann. § 770.16(3)(b)(iii) (West 2002) (same); Minn. Stat. § 590.01(1a)(2)(b)(1) (2002) (same); Mo. Rev. Stat. § 547.035(4) (2002) (same); N.J. Stat. Ann. § 2A:84A-32a(a)(1)(a) (West 2002) (requiring petitioner to explain, inter alia, "why the identity of the defendant was a significant issue in the case"); N.M. Stat. Ann. § 31-1A-1(C)(3)

assert that those convicted offenders who confessed or pled guilty should be estopped from claiming that they are innocent.[279]

There are two critiques of this argument. First, because the petitioner was convicted of a crime, it is difficult to say that a petitioner who confessed or pled guilty was successful in a prior proceeding.[280] Thus, a key element for the application of judicial estoppel is not met.[281] Second, it is questionable whether the position that one is actually innocent is truly inconsistent with confessing or pleading guilty. The accounts of DNA exonerees who were originally convicted on the basis of their false confessions demonstrate that there are many reasons why people confess to a crime they did not commit that have nothing to do with actually being guilty.[282] Moreover, the Supreme Court has recognized that individuals plead guilty for a multitude of reasons other than that they are actually culpable, and that this is constitutionally permissible.[283]

Furthermore, courts are reluctant to invoke the doctrine of judicial estoppel to bar defendants who pled guilty or took some strategic action seemingly inconsistent with a claim of actual innocence from pursuing innocence-based post-conviction relief.[284] For example, in *Morris v.*

(LexisNexis 2001) (requiring petitioner to present prima facie proof that, inter alia, "identity was an issue in the initial trial"); Utah Code Ann. § 78-35a-301(2)(c) (2001) (requiring petitioner to assert, inter alia, a "theory of defense, not inconsistent with theories previously asserted at trial"); Kathy Swedlow, *Don't Believe Everything You Read: A Review of Modern "Post-Conviction" DNA Testing Statutes*, 38 Cal. W. L. Rev. 355, 358 n.12 (2002). For an analysis of the arguments in favor of amending state statutes to provide for post-conviction DNA testing to prisoners who pled guilty, see Daina Borteck, Note, *Pleas for DNA Testing: Why Lawmakers Should Amend State Post-Conviction DNA Testing Statutes to Apply to Prisoners Who Pled Guilty*, 25 Cardozo L. Rev. 1429 (2004).

279. *Cf.* Goldberg & Siegel, *supra* note 24, at 405.

280. While success in a prior proceeding is certainly lacking in cases where a petitioner confessed and was convicted, a prosecutor could argue that by pleading guilty, a petitioner "successfully" avoided a potentially longer sentence that he would have faced had he been convicted after a trial.

281. *See* Konstantinidis v. Chen, 626 F.2d 933, 939 (D.C. Cir. 1980) (observing that "success in the prior proceeding is clearly an essential element of judicial estoppel").

282. *See supra* note 42.

283. *See* North Carolina v. Alford, 400 U.S. 25 (1970) (holding that an individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime for a number of reasons, including the avoidance of the death penalty). In *Alford*, the Court observed that state courts had long recognized that there are "[r]easons other than the fact that he is guilty [which] may induce a defendant to so plead . . . . He must be permitted to judge for himself in this respect." *Id.* at 33 (citations omitted); *see also, e.g.*, United States v. Vonn, 535 U.S. 55, 69 n.8 (2002) (observing that the *Alford* theory permits a defendant to plead guilty simply to avoid the expenses or unpredictable nature of trial).

284. *See, e.g.*, Mozingo v. Superior Court of Sacramento County, No. C042193, 2003 Cal. App. Unpub. LEXIS 5308, at *13 (Ct. App. May 30, 2003) (holding that a petitioner who previously claimed ineffective assistance of counsel on the grounds that his trial counsel failed to investigate a diminished capacity defense is not taking a totally inconsistent position when he pursues innocence-based post-conviction relief; thus, he is not estopped from pursuing innocence-based post-conviction relief on such grounds); *cf.* Godschalk v. Montgomery County Dist. Attorney's Office, 177 F. Supp. 2d 366, 369-70 (E.D. Pa. 2001) (finding a right to post-conviction DNA testing despite the defendant's "confession").

California,[285] the Ninth Circuit reversed the district court's application of judicial estoppel against a petitioner in a habeas corpus proceeding, which allowed the petitioner to assert that she testified falsely at trial on the advice of her attorney in support of her ineffective assistance of counsel claim.[286] In its holding, the court observed the following:

> No circuit has ever applied the doctrine of judicial estoppel to bar a criminal defendant from asserting a claim based on innocence, either on direct appeal or on habeas corpus, and we will not do so now .... Justice would not be served by holding the defendant to her prior false statements, because to do so would assign a higher value to the "sanctity of the oath" than to the guilt or innocence of the accused .... The judicial process can more easily survive a rule that precludes the use of judicial estoppel to keep intact convictions of innocent persons than it can a rule that purports to preserve judicial sacrosanctity by leaving wrongful convictions in place .... We hold that the doctrine of judicial estoppel may not be invoked where its use would serve to keep a conviction in effect regardless of the innocence or guilt of the defendant.[287]

Thus, for the aforementioned reasons, it is unlikely that courts will bar convicted offenders who confessed or pled guilty from pursuing innocence-based post-conviction relief on the basis of exculpatory DNA test results.[288]

III. COURTS SHOULD STOP PROSECUTORS FROM CHANGING THEIR STORIES FROM TRIAL TO PROTECT THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM

Part III demonstrates two ways in which courts can and should prevent the State from changing its story from trial when the results of post-conviction DNA testing exclude the person convicted of a crime as the source of critical biological evidence from the crime scene.

A. *Standard of Review*

Courts that continue to analyze DNA-based post-conviction claims of innocence under the newly discovered evidence test should follow the logic of the court in *Commonwealth v. Reese*,[289] and prohibit prosecutors from introducing a theory of the crime not introduced to the jury at trial. In the alternative, courts should consider adopting a new test, analogous to the harmless error test, to analyze DNA-based post-conviction claims of innocence.

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285. 966 F.2d 448 (9th Cir. 1992).
286. *Id.* at 452-54.
287. *Id.* at 453.
288. See text accompanying *infra* notes 306-09 for arguments as to why courts should not invoke judicial estoppel to bar post-conviction claims of innocence of those convicted offenders who confessed or pled guilty.
289. 663 A.2d 206 (Pa. Super. Ct. 1995).

1. The Appropriate Analysis Under the Newly Discovered Evidence Test Precludes the Admission of Any State Evidence Which Was Not Introduced at Trial

First, courts that continue to analyze DNA-based post-conviction claims of innocence under the newly discovered evidence standard should adopt the logic of the court in *Commonwealth v. Reese,*[290] and refuse to hear evidence that was not presented to and heard by the jury at the original trial in determining whether the DNA evidence would have affected the trial had it been introduced.[291] Allowing the State to argue alternate explanations of the crime to rebut a petitioner's contention that the DNA evidence would have changed the result if admitted at trial is tantamount to conceding that the DNA test results undermine the verdict reached at trial.[292] Thus, petitioners have, effectively, met their burden for granting the petitioner's motion for a new trial on the basis of newly discovered evidence.

2. Courts Should Adopt the Harmless Error Test as the Standard of Review for DNA-Based Post-conviction Claims of Innocence

However, cases in which critical biological evidence was previously introduced at trial and linked to the defendant through conventional serology testing are distinguishable from traditional cases involving newly discovered evidence, evidence which by definition was not and could not have been introduced at trial.[293] For this reason, the results of DNA testing are more appropriately characterized as proof which shows that the jury was presented with erroneous evidence at trial.[294] As such, courts should adopt a new standard of review that analyzes the impact that the erroneous evidence had on the jury verdict. Specifically, courts should adopt a test analogous to the harmless error test as the standard of review for post-conviction motions for relief based on new DNA evidence that demonstrates that the convicted offender was not the source of critical biological evidence previously linked to him or her at trial.[295] Harmless error is a more appropriate standard under which to analyze these particular claims because the results of post-conviction DNA testing demonstrate that the jury was presented with erroneous evidence at trial.[296] Furthermore, because the concerns that arise with respect to traditional forms of newly discovered evidence[297] are not implicated in the context of post-conviction DNA testing, it would be fundamentally unfair to impose a test with such

290. *Id.*
291. *Id.* at 209-10.
292. *See* Petition for Review, *supra* note 65, at 29-30.
293. *See supra* note 155 and accompanying text.
294. *See supra* note 155 and accompanying text.
295. *See supra* note 155 and accompanying text.
296. *See supra* note 155 and accompanying text.
297. *See supra* notes 161-65 and accompanying text.

strict time limits on petitioners who have such compelling and incontrovertible evidence of innocence.[298]

Under the harmless error test, the State would bear the burden of proving that the admission of evidence at trial that linked the convicted offender to biological materials from the crime scene was "harmless" and did not significantly contribute to the jury's guilty verdict.[299] Applying the harmless error test in these proceedings would naturally compel prosecutors to explain how the exculpatory post-conviction DNA results comport with the theory of the crime presented at trial. If the State cannot meet this burden, a new trial should be granted, in which the State can present their new factual scenario to the appropriate fact finder—a jury.

B. *Judicial Estoppel*

Courts should invoke the doctrine of judicial estoppel against the State in cases where the results of post-conviction DNA testing so undermine the theory upon which a defendant was convicted that the only way for the State to justify the maintenance of the conviction is to create a radically new theory of the crime. The application of the doctrine against the State in these situations is appropriate for two reasons: (1) The three conditions required for the application of the doctrine in criminal cases are satisfied, and (2) the application of judicial estoppel in these cases would advance the policy goals of the doctrine.

1. The Three Conditions Required to Apply Judicial Estoppel in Criminal Proceedings Are Met

The three conditions set forth by courts for the application of judicial estoppel in criminal proceedings are met in these cases. In these proceedings, the parties are without question the same.[300] The facts are also the same; namely, that biological evidence originating from someone other than the victim was found on or near the victim.[301] Similarly, the question involved is the same—whether the convicted offender is the actual perpetrator of the crime.

The third, and perhaps most crucial, condition required for the application of judicial estoppel—that the State is advancing a position inconsistent with the position it successfully maintained at trial—is also satisfied. An argument is truly inconsistent with an assertion maintained at trial when "'the truth of one . . . necessarily preclude[s] the truth of [the] other.'"[302] Under this standard, it is clear that offering the new theory of an "unindicted co-ejaculator" or some other unknown accomplice in post-

298. *See supra* notes 166-70 and accompanying text.
299. *See supra* note 159 and accompanying text.
300. *See supra* notes 189-90 and accompanying text.
301. *See* Petition for Review, *supra* note 65, at 28.
302. Boyers, *supra* note 85, at 1263 (quoting Dep't of Transp. v. Coe, 445 N.E.2d 506, 508-10 (Ill. App. Ct. 1983)).

conviction proceedings, as prosecutors did in the cases of Earl Washington and Jerry Watkins, is clearly inconsistent with the State's assertion at trial that this particular defendant was alone responsible for the rape or murder of the victim.[303] It is also inconsistent for a prosecutor to suggest that a victim was promiscuous to explain the exculpatory results of post-conviction DNA testing after asserting at trial that the victim had not had sex with anyone else before the attack, as the State did in Roy Criner's case.[304] A stronger incidence of inconsistency occurs when a prosecutor denigrates the probative value of post-conviction DNA test results after having used now-rudimentary conventional serology test results at trial to link the defendant to the crime, as prosecutors did in the cases of Wilton Dedge and Ralph Armstrong.[305] In all of these scenarios, the State's theory from trial and the new theory introduced for the first time in post-conviction proceedings cannot both be true; thus they are truly inconsistent.

By contrast, the fact that a defendant confessed or pled guilty is not truly inconsistent with a post-conviction claim of actual innocence.[306] The number of post-conviction DNA exonerations that revealed that the individual had given a false confession demonstrates that a confession is not always motivated by actual culpability.[307] Similarly, criminal defendants plead guilty for a multitude of strategic reasons, many of which have nothing to do with being guilty of the crime for which they are charged.[308] Therefore, defendants who find themselves in such a predicament that they see confessing or pleading guilty to be their only viable alternatives should not later be estopped from pursuing post-conviction claims of innocence. Furthermore, applying judicial estoppel in this way would seriously hinder the system of plea bargaining. Considering that between eighty-eight and ninety-five percent of criminal cases are resolved via plea bargaining,[309] the application of judicial estoppel against these convicted offenders could have a tremendous impact on the criminal justice system as a whole.

The prior success test is also met in these cases. Under the prior success test, a prior assertion need only have been accepted by the court to be considered successfully maintained.[310] Because it is difficult—or perhaps impossible—to determine what facts presented at trial specifically influenced a jury's decision in a criminal trial, judicial estoppel applies in

303. *See supra* notes 123-28, 226-29 and accompanying text.
304. *See supra* notes 11-12 and accompanying text.
305. *See supra* notes 58, 199-201 and accompanying text.
306. *See supra* notes 277-83 and accompanying text.
307. *See supra* note 42.
308. *See supra* note 283 and accompanying text.
309. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics: Disposition of Cases Terminated in U.S. District Courts 418 tbl.5.17 (2001), *available at* http://www.albany.edu/sourcebook/pdf/t517.pdf; Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics: Felony Convictions in State Courts 450 tbl.5.46 (2001), *available at* http://www.albany.edu/sourcebook/pdf/t546.pdf.
310. *See supra* note 243 and accompanying text.

criminal cases if the trial record reflects that the evidence being contradicted was significant to the guilty verdict.[311]

In all of the cases detailed above, the State used conventional serology evidence at trial to link the defendant to the crime.[312] Moreover, the trial records from these cases indicate that this forensic evidence was often the linchpin of the State's case against the defendant.[313] Indeed, the DNA exonerations where the original conviction rested largely on the basis of conventional serology test results indicate that juries presented with such evidence did, in fact, view it as highly indicative of guilt.[314] Furthermore, the Supreme Court has recognized that expert testimony regarding serology evidence that linked a defendant to a crime constituted "a vital part in the case for the prosecution" and "an important link in the chain of circumstantial evidence" implicating the defendant as the perpetrator.[315]

There can be no doubt that a review of the trial records in these cases would show that the forensic evidence, the importance of which the State is contradicting in post-conviction proceedings, was a significant factor in obtaining a conviction against the defendant. Therefore, the State's prior position, inconsistent with what is being argued in the face of exculpatory post-conviction DNA test results, was successfully maintained at trial. Given that the other requirements are satisfied for the application of judicial estoppel in these cases,[316] "the prosecution should be able to avoid the impact of the doctrine only by demonstrating that the inconsistent theory was specifically rejected by the court or the jury [at] trial."[317]

2. The Application of Judicial Estoppel in These Cases Advances the Stated Policy Goals of the Doctrine

Furthermore, the application of judicial estoppel against the State in cases where the State reverses course from trial and presents a radically new theory of the crime in a subsequent proceeding advances the stated policy

311. *See supra* note 249 and accompanying text.

312. *See supra* notes 3-4, 58, 114, 119, 199 and accompanying text; *see also supra* note 43.

313. *See, e.g.*, Petition for Review, *supra* note 65, at 6. At Ralph Armstrong's trial, an expert witness testified that hairs "very carefully" removed from the victim's body were "consistent with" and "similar to" the defendant's reference samples. *Id.* Furthermore, during the State's closing argument to the jury, the prosecutor showed the victim's bloody robe belt to the jury and stated "[t]wo of the defendant's hairs were on this robe" and that there was "no explanation" for those hairs being there "except that the defendant murdered" the victim. *Id.*; *see also* Sellers, *supra* note 59 (recounting how the prosecutor argued at Dedge's trial that the man who committed the rape "would have pubic hair identical to Wilton Dedge—Dedge's pubic hair"); *cf.* Watkins v. Miller, 92 F. Supp. 2d 824, 838-39 (S.D. Ind. 2000) (observing that the State's case would have been severely compromised had the jury not accepted the State's "bacterial contamination" theory).

314. *See supra* note 43.

315. Miller v. Pate, 386 U.S. 1, 4 (1967).

316. *See supra* notes 300-05 and accompanying text.

317. Poulin, *supra* note 25, at 1455.

goals of the doctrine.[318] Judicial estoppel is warranted in these cases because the prosecution is deliberately changing their position according to the exigencies of the moment, behavior which undermines the integrity of the justice system.[319] The integrity of the justice system is further compromised when the State advances inconsistent theories of the crime in separate proceedings because one theory is necessarily incorrect, and thus one of the courts was misled.[320] Prosecutors are considered "minister[s] of justice,"[321] whose "obligation is . . . to see that, so far as possible, truth emerges."[322] The impression that a prosecutor has misled a court, and that this deception resulted in the conviction or continued incarceration of an innocent person, no doubt erodes "public confidence in the purity" of the judicial system,[323] a scenario which cries out for the application of judicial estoppel.

CONCLUSION

DNA testing at the outset of prosecution is now routine; thus it is likely that the number of wrongful convictions that can be exposed through post-conviction DNA testing will decrease and ultimately disappear.[324] This does not mean, however, that the problems that lead to wrongful convictions have been cured.[325] While DNA evidence can and will prevent the wrongful conviction of some wrongly identified suspects, it cannot and will not prevent the errors that occur in the vast majority of cases, where the perpetrator has left behind no biological evidence that can be tested.[326] Thus, it is only in those few cases that have dispositive biological evidence that post-conviction DNA testing prevents miscarriages of justice.[327]

It is impossible to know how many innocent people are currently imprisoned in this country, yet the 163 DNA-based exonerations suggest the number is not insignificant;[328] indeed, the DNA-based exonerations likely comprise only the tip of the iceberg.[329] However, non-DNA post-

318. *See supra* notes 81-88 and accompanying text.
319. *See supra* notes 78-79 and accompanying text.
320. *See* Poulin, *supra* note 25, at 1463.
321. *See* Model Rules of Prof'l Conduct R. 3.8 cmt. 1 (2001).
322. Peter Neufeld, *Have You No Sense of Decency?*, 84 J. Crim. L. & Criminology 189, 202 (1993) (citing Giles v. Maryland, 386 U.S. 66, 98 (1967) (Fortas, J., concurring)); *see also* United States v. Duke, 50 F.3d 571, 578 n.4 (8th Cir. 1995) (noting that the prosecutor has the "duty to serve and facilitate the truth-finding function of the courts"); United States v. Kojayan, 8 F.3d 1315, 1323 (9th Cir. 1993) (noting that "lawyers representing the government in criminal cases serve truth and justice first").
323. *See supra* note 85 and accompanying text.
324. Findley, *supra* note 40, at 337.
325. *Id.*
326. *Id.*
327. *Id.*
328. Medwed, *supra* note 52, at 131.
329. *Id.*; *see also Protecting the Innocent*, *supra* note 29, at 221 ("The vast majority (probably 80%) of felony cases do not involve biological evidence that can be subjected to DNA testing."); Paul G. Cassell, *Protecting the Innocent from False Confessions and Lost*

conviction cases are much harder for convicted offenders to win because of the absence of a method to prove innocence to a scientific certainty,[330] yet these cases presumably contain the same proportion of flaws—including erroneous eyewitness identifications, false confessions, and inclusive results of now-rudimentary conventional serology analysis—that led to the wrongful convictions in the cases later reversed through DNA test results.[331]

It has been said that "[w]rongful convictions will continue to occur as long as our criminal justice system utilizes human actors. Exonerations due to DNA testing only serve to underscore the risk of mistake in every case."[332] The reaction of prosecutors to post-conviction innocence claims has had and will continue to have a great bearing on whether actually innocent prisoners receive justice,[333] and, therefore, on the perception of the criminal justice system as a whole. Thus, the larger question posed by the number of DNA-based exonerations is whether the exposed flaws in the system will cause prosecutors to listen sympathetically to and avoid making inconsistent arguments against claims of actual innocence based on less categorical forms of evidence.[334]

Justice demands that every reasonable measure be taken to ensure that no innocent person suffer a wrongful conviction.[335] Moreover, public safety demands accuracy in convictions, because when an innocent person is convicted, the true perpetrator goes unpunished, free to commit additional crimes that may have been prevented.[336]

Confessions—And from Miranda, 88 J. Crim. L. & Criminology 497, 518 (1998) (estimating that "approximately 330 wrongful convictions occur around the country each year"); Richard A. Rosen, *Innocence and Death*, 82 N.C. L. Rev. 61, 69-70, 73 (2003) (observing that DNA exonerations comprise "a random audit of convictions," and that "DNA testing has demonstrated beyond question that in the normal course of events, using the normal run of evidence, we convict innocent people," thus, "for every defendant who is exonerated because of DNA evidence, there have been certainly hundreds, maybe thousands, who have been convicted" on comparable evidence yet whose cases lack physical evidence suitable for scientific testing).

330. Medwed, *supra* note 52, at 131-32.

331. *Id.* at 131; *see also* Death Penalty Information Center, Innocence and the Crisis in the American Death Penalty, http://www.deathpenaltyinfo.org/article.php?scid=45&did=1149#Sec05b (last visited Sept. 28, 2005).

332. *See* Death Penalty Information Center, *supra* note 331.

333. Medwed, *supra* note 52, at 132.

334. *See* Liptak, *supra* note 111.

335. Findley, *supra* note 40, at 337-38.

336. *Id.* For example, Christopher Ochoa and Richard Danziger were wrongfully convicted of the rape and murder of their coworker. As a result, the real perpetrator, Achim Marino, remained free in the community, where he committed numerous rapes and robberies for which he was eventually sentenced to life in prison. *Id.* at 338 n.23.